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THE OCCUPATION OF THE MATRIMONIAL HOME

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF LAWS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE OCCUPATION OF THE MATRIMONIAL HOME submitted by RICHARD CALHOUN SECORD in partial fulfilment of the requirement for the degree of Master of Laws.

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TO

ROSEMARY

Abstract

The purpose of this thesis is to determine the rights which spouses have to occupy the matrimonial home at common law and under existing statutes. An historical perspective will be taken when the circumstances require it so as to illustrate the changes which the law has undergone in this area. Conversely, a futuristic perspective will be taken occasionally to indicate suggested reform, especially when the reform has been mooted by the law reform institutions. The thesis will not attempt to enumerate the means whereby a spouse can acquire a legal or equitable interest in the matrimonial home. On the contrary, it will be presumed where the context requires it that a spouse has either (1) no interest, or (2) a partial interest, or (3) the sole interest in the matrimonial home. From those premises it will be determined under what circumstances a spouse has the right to occupy the matrimonial home and whether those rights can be terminated.

I have attempted to state the law as of July 1st, 1979.

Preface

> There has never been any doubt, of course, that irrespective of ownership or tenancy, both spouses had against each other jure maritali the right to occupy and to use the matrimonial home so long as the consortium lasted, but the nature of this right has never been properly explored. (O. Kahn-Freund in Matrimonial Property Law (W. Friedmann ed. 1955, p. 299).

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I. ENGLAND

A. The right of the wife to occupy the matrimonial home vis-a-vis her husband

(1) the strict position at common law

At common law a wife had virtually no rights at all.[1] The husband, however, did have a duty to support his wife[2] and at common law if he failed in his duty his wife could pledge his credit for necessaries.[3] But the wife had no right to occupy the matrimonial home and the husband could bundle her out into the street like furniture, should he so wish. In National Provincial Bank v. Ainsworth, Lord Wilberforce stated:[4]

> English law...gives to the wife no interest, or participation, in her husband's property: the common law right of dower...has been abolished. Since 1833 the husband has

---

1. See generally, Lush, Husband and Wife (4th ed. 1933). Virtually all of the wife's property merged with and was controlled by the husband. As Pollock and Maitland wrote in History of English Law (1898) Vol. 1, Bk. II, c. 11, at 485 "the main idea which governs the law of husband and wife is not that of an 'unity of person' but that of the guardianship, the mund, the profitable guardianship, which the husband has over the wife and over her property." For a history of the common law in this area, see the texts referred to in Lush, supra at 8, note (s).

2. Now statutory; see National Assistance Act 1948, s. 42 and Ministry of Social Security Act, 1966, s. 22. See O. Stone, Family Law (1977) 86.

3. Manby v. Scott (1663) 1 Mod. Rep. 124; the Matrimonial Proceedings and Property Act 1970, s. 48(1) abolished the wife's agency of necessity: "Any rule of law or equity conferring on a wife authority, as agent of necessity of her husband, to pledge his credit or borrow money on his credit is hereby abrogated." Section 41 was repealed by the Matrimonial Causes Act 1973, s. 54(1), Sched. 3; and see O. Stone, supra n. 2 at 91, 92.

4. Sub nom National Provincial Bank v. Hastings Car Mart [1965] A.C. 1175. The italics in the passage are mine.

> been absolutely free, inter vivos, to dispose of any... property which he owns without his wife's concurrence. The common law, moreover, does not recognise as having any special status in the law of property, a matrimonial home, though this expression will be found in several of the cases: *nor does it recognise any right of the wife to remain in any of the husband's property against his will.* Although the husband could not directly sue her for trespass he could, by the device of a fictitious lessee, bring an action of ejectment against her. The case of Doe d. Merigan v. Daly[5] is of interest not only because it shows this, but because the defendant wife was actually a deserted wife.

To the same effect, Lord Denning in Bendall v. McWhirter said:[6]

> Even if the husband did not turn her out, nevertheless when he ceased for any reason to be entitled to the house she would have to leave it: for she had no right of her own to stay there.

Thus a strict reading of the common law shows that a wife could not hold property in her own right and furthermore, she did not even have the right to occupy the matrimonial home against her husband's wishes. As one writer has put it, the problems inherent in this area have stemmed from the "common law emphasis on property rights and the lack of any developed concept of a right of occupation."[7] As Lush wrote in 1933:[8]

> Marriage does not now and never has given, either in law or in equity, during its subsistence, to a wife any

---

[5] (1846) 8 Q.B. 934. In Studies in Canadian Family Law (D. Mendes da Costa ed., 1972) M.C. Cullity in his article "Property Rights During the Subsistence of Marriage" writes at 208 n. 106 that the case of Doe d. Merigan v. Daly does not support the proposition that the wife in that case was deserted.

[6] [1952] 2 Q.B. 446.

[7] Susan H. Blake, "Towards a definition of the right to occupy" 8 Family Law 133.

[8] Lush, supra, n. 1 at 76.

> rights in her spouse's property. The obligation to maintain his wife that a man incurs by marriage does not in the proper sense of the term give the wife any rights in her spouse's property...

(2) in equity

The Court of Chancery developed the doctrine of the married woman's separate estate[9] which mitigated the common law doctrine that marriage operated as an assignment to the husband of the wife's property. Property which was settled on the wife for her separate use was therefore free from her husband's control.[10] This doctrine allowed the wife to remain in the matrimonial home provided that it was property settled upon her for her separate use.

In National Provincial Bank Ltd. v. Ainsworth, Lord Wilberforce stated:[11]

> Equity followed the law in not conferring upon the wife any interest in the husband's property during his life. Equitable intervention was confined to the protection of the wife's trust property or separate property from the husband.... But equity did more than this if the circumstances required. For though the wife had (apart from dower) no proprietary interest, at law or in equity, in her husband's property, she had certain rights against her husband by virtue of her status of marriage; and equity, in disputes as to property between husband and wife came to recognise those rights.... By virtue of marriage, a wife acquired the right to two things: the right of cohabitation with her husband and the right to support according to her husband's estate and condition.... *The essential point is that the wife had no right to be provided with, or kept in, any particular home:*[12] her rights were not rights in rem, nor were they

---

[9] See generally id., Chapter III.

[10] Royal Commission on Marriage and Divorce (1951-1955) at 162.

[11] [1965] A.C. 1175 at 1244.

[12] Italics mine.

> related to any particular property: they were purely personal rights against her husband, enforceable by proceedings against his person, which he could satisfy by rendering conjugal rights....nothing in the various reforms which have taken place has altered the fundamental character of the wife's rights....and now no more than before 1857 has she, by virtue of her married status, any specific right to be provided with or maintained in any particular property.

This passage shows that outside of the doctrine of the married woman's separate estate, a wife had no rights in equity to be maintained in any property although equity did recognise those purely personal rights which were enforceable by proceedings against the husband.

(3) through the ecclesiastical courts

Harold Lightman Q.C., counsel for the wife in National Provincial Bank Ltd. v. Ainsworth said:[13]

> the ecclesiastical court by virtue of its remedy of a decree of restitution of conjugal rights provided a means whereby a wife could remain in the matrimonial home for if the husband dislodged her he suffered imprisonment.

Lord Wilberforce in the same case commented:[14]

> She could obtain against him, from the ecclesiastical courts, an order for restitution of conjugal rights which, in its usual form, ordered him to take her home and receive her as his wife and render her conjugal rights - an order which could be enforced by attachment for non-obedience. What the wife gained by the order was the provision of a suitable dwelling house and maintenance coupled with the obligation of the husband to live with her.[15]

---

[13] [1965] A.C. 1175 at 1200.

[14] Id. at 1245.

[15] See Weldon v. Weldon (1883) 9 P.D. at 56.

The jurisdiction of the ecclesiastical courts was given to the Divorce Courts in 1858 and then to the High Court in 1875.[16] After 1884[17] there was no sanction for failure to comply with the decree of restitution of conjugal rights.[18] In Nanda v. Nanda[19] a wife obtained a decree for restitution of conjugal rights and promptly placed herself in the husband's apartment against his will. It was held that she was trespassing and that the decree gave her no right to insist upon cohabitation in the matrimonial home with her husband. The decree was abolished in 1970.[20]

(4) Lord Denning's development of the common law and statutory intervention

In 1870 wives were given by statute[21] certain rights in respect of personal property and in 1882 the Married Women's Property Act (which is still in force) allowed wives to retain all their property on marriage and later legislation removed the common law restrictions on the capacity of married women to deal with property. Section 17 of the 1882 Act allows the court to make such order as it thinks fit whenever there is a dispute between husband and wife over the title to property. It was this section and the unlikely case of Bramwell v. Bramwell[22] which gave birth to the notion that a wife had a right to stay in the matrimonial home even though the house stood in the husband's name. Lord Denning in Bendall v. McWhirter summarised the development in this way:[23]

---

[16] Supreme Court of Judicature Act 1875.

[17] Matrimonial Causes Act 1884.

[18] See generally Lush, supra n. 1 at 34 and Bromley, Family Law (5th ed. 1976) at 122.

[19] [1967] 3 All E.R. 401, [1968] P. 351.

[20] Matrimonial Proceedings and Property Act 1970, s. 20.

[21] Married Women's Property Act 1870.

[22] [1942] 1 K.B. 370.

> This has only been decided in the last 10 years. It started in 1942 when Goddard L.J. said that the husband's only way of getting his wife out of the house was to make an application under section 17.... That section gives the court a very wide discretion in the matter.... and it is now *settled law* that a deserted wife has a right, as against her husband to stay in the matrimonial home unless and until an order is made against her under section 17.

As to the nature of this right, Denning L.J. had this to say:[24]

> It bears, I think, a very close resemblance to her right to pledge her husband's credit for necessaries. Under the old common law, when a husband deserted his wife...she had an irrevocable authority to pledge his credit for necessaries.... One of the most obvious necessaries of a wife is a roof over her head; and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home, the wife should have an irrevocable authority to continue the tenancy on his credit; and that when he is the owner of it she should have an irrevocable authority to stay there. This authority, like the old one, is based on an irrebutable presumption of law. The husband cannot revoke it except by order of the court under section 17 of the Act of 1882.

Despite the obvious merits of this equitable extension of the common law, the House of Lords in Ainsworth had no choice but to find that not only was the wife's authority revocable at the instance of third parties but that a wife never did have the right at common law to stay in the matrimonial home when it was owned by the husband. Thus in 1966 Denning's *settled law* was overturned by the House of Lords. In the words of

---

[23] [1952] 2 Q.B. 466 at 475.

[24] Id. at 476.

Lord Hodson:[25]

> The matrimonial law did not, however, at any time give the wife any property in the house in which she lived with her husband unless she could rely upon a settlement. His duty is to live with his wife and to support her but she has no proprietary rights in the house by virtue of her status as wife.... If her husband leaves her the right which she has to be left undisturbed is a personal right and does not attach itself to any specific piece of property which may at any given time be the home in which the spouses have lived together.

Similarly, Lord Cohen said:[26]

> It is common ground that the respondent's right to remain in the house is a mere equity; and that her husband's desertion does not confer on her any equitable estate or in the house: she could no doubt have obtained from a Court of Equity an injunction restraining her husband from dealing with the house so as to interfere with her enjoyment thereof.[27]

In the words of Lord Upjohn:[28]

> Neither the common law nor the ecclesiastical law ever went further or gave the wife any right to occupy any particular matrimonial home which was the sole property of the husband.
>
> Secondly if a husband failed to maintain his wife the common law did no more than give the wife the right to pledge her husband's credit for necessaries.... But on the other hand, having regard to the duty of the spouses to live together the court does not, during the subsistence of the marriage, merely give effect to the strict legal and equitable rights of a spouse qua owner of the property as though the spouses were strangers. Recognising the obligations of the spouses to live together the court will only make orders with regard to

---

[25] [1965] A.C. at 1220. Lord Guest agreed with Lord Hodson and for a similar statement by Lord Wilberforce see page 2 of my text above.

[26] _Id_. at 1228.

[27] _See_ _Lee_ v. _Lee_ [1952] 2 Q.B. 489 n, [1952] 1 T.L.R. 968, [1952] 1 All E.R. 1299.

[28] [1965] A.C. at 1229, 1230; for an analysis of _Ainsworth_, _see_ S.J. Bailey, (1965) _C.L.J._ 216.

> the occupation of the matrimonial home subject to those obligations.[29]

After Ainsworth, it is fair to surmise that the common law reverted to what it was before Lord Denning's development of it, namely that a wife by virtue of her married status had no right to be provided with or maintained in any particular property although she did have personal rights against her husband to support. Of course, these personal rights were not worth very much in a situation where the wife was deserted and the husband defaulted on mortgage payments or sold the house over the wife's head.

The House of Lords decision in Ainsworth precipitated the passing of the Matrimonial Homes Act 1967 which embodied the very idea that Denning L.J. had sought to engraft upon the common law, namely that a wife has the right to occupy the matrimonial home. Before examining the Matrimonial Homes Act and subsequent amending legislation[30] it is worth mentioning that the common law was not left to rest in its Ainsworth grave. In Gurasz v. Gurasz[31] Lord Denning gave his own conclusions on the state of the common law:[32]

> I propose first to deal with the position at common law, because it is an essential preliminary to understanding

---

[29] This was how Lord Upjohn explained the cases of Hill v. Hill [1916] W.N. 59, Shipman v. Shipman [1924] 2 Ch. 10, Stewart v. Stewart [1948] 1 K.B. 507 and Gorulnick v. Gorulnick [1958] p. 47. These cases are discussed in section D below. At 1231 Lord Upjohn said: "Thus the principle is that the court when giving effect to the legal and equitable rights of the spouse who is owner of the property by way of injunction or possession does so subject to the overriding mutual marital right and duty of the spouses to live together."

[30] Domestic Violence and Matrimonial Proceedings Act 1976, c. 50.

[31] [1969] 3 All E.R. 822.

[32] Id. at 823.

> the import of the (Matrimonial Homes) Act.
>
> Some features of family life are elemental in our society. One is that it is the husband's duty to provide his wife with a roof over her head; and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home. The husband is not at liberty to turn her out of it, neither by virtue of his command, nor by force of his conduct. If he should seek to get rid of her, the court will restrain him. If he should succeed in making her go, the court will restore her. In an extreme case, if his conduct is so outrageous as to make it impossible for them to live together, the court will order him to go out and leave her there.
>
> This right is a personal right which belongs to her as a wife. It is not a proprietary right. It is not available against third persons. It is only available against the husband. No matter whether the house is in the wife's name, or in the husband's name, or in the names of both jointly, nevertheless she has this personal right which the court will protect. So long as she has done nothing to forfeit that right, the court will enforce it by making an injunction to restrain the husband from interfering with the exercise of it.

In this case the wife was a joint-owner of the matrimonial home and so had a legal right to occupy the matrimonial home. In Ainsworth, the House made it quite clear that a wife had no right to be maintained in the matrimonial home where the husband was the sole owner. Yet in Gurasz Lord Denning enlarges the wife's personal right to encompass the right to occupy the matrimonial home. Of course there is no question of the justice of having the wife's personal rights enforceable in Denning's way, but it is submitted that it does not represent the true state of the common law as laid down by the House in Ainsworth. Put bluntly, a wife does not have the right to occupy a matrimonial home which is solely owned by the husband at common law. At the most, such a wife was entitled to adequate support or alternative accommodation.

In any event, much that Lord Denning had sought to do at common law has been achieved by the Matrimonial Homes Act 1967.

(5) the position today

The inadequacies of the common law and equity gave way to the Matrimonial Homes Act. The scheme of the Act is to give a registrable right of occupation to spouses who cannot claim any proprietary right to occupy the matrimonial home. Section 1 provides:

> 1. (1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the following provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as "rights of occupation"):-
>
> (a) if in occupation, a right not be evicted or excluded from the dwelling house or any part thereof by the other spouse except with leave of the court given by an order under this section;
>
> (b) if not in occupation, a right with leave of the court so given to enter into and occupy the dwelling house.

Initially therefore the useful powers under the Act did not extend to joint-tenancies and this was one criticism of it.[33] Furthermore, for a few years there was a hiatus in the Act in that if a wife[34] had an interest in equity although legal title was in the husband's name alone, then the wife was outside the scope of the Act.[35] This defect was cured by the Matrimonial Proceedings and Property Act 1970[36] so that spouses who have equitable interests only will be able to use the Matrimonial Homes Act.

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[33] Bromley, supra n. 18 at 479.

[34] For the sake of convenience I will speak of the wife having only an equitable interest; of course the 1967 Act applies equally to husbands as it does to wives.

[35] Gurasz v. Gurasz [1969] 3 All E.R. 822, [1970], P. 11.

[36] S. 38.

There remained the anomaly of the legal joint-tenancy. It was no doubt thought that the legal estate would afford sufficient protection, however the useful powers under the Act to regulate occupation were not available. Furthermore, the Act, although designed to mitigate the effect of Ainsworth, was severely handcuffed by the House of Lords decision in Tarr v. Tarr[37] where it was held that the court had no power to exclude the spouse with the legal estate from the matrimonial home, despite the fact that the wording of the Act[38] allowed the court to "regulate" the spouse's right to occupy.

So the legislators went to work again and in consequence the Domestic Violence and Matrimonial Proceedings Act 1976 was enacted.[39] Section 4 provides:

> (1) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling-house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant.
>
> (2) In relation to orders under this section, section 1(3), (4) and (6) of the Matrimonial Homes Act 1967 (which relate to the considerations relevant to the contents of, and to the jurisdiction to make, orders under that section) shall apply as they apply in relation to orders under that section; and in this section dwelling-house has the same meaning as in that Act.

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[37] [1973] A.C. 254. Spouses were left to fall back on the common law if they wished to exclude the other spouse from the matrimonial home.

[38] S. 1(2).

[39] C. 50.

> (3) Where each of two spouses is entitled to occupy a dwelling-house by virtue of a contract, or by virtue of any enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.

Thus whether a wife is a joint-tenant or has no interest whatsoever in the legal estate, she is able to apply to the court for an order permitting her to occupy the matrimonial home or for an order prohibiting, suspending or restricting the other spouse's right to occupy the matrimonial home. This section solves the problem which occurred in Gurasz. The spouses are no longer forced to rely on the vagaries of the common law[40] or on a section 17 application[41] to sort out their rights or to obtain relief from a violent spouse.

There still remained the problem of the House of Lords' restrictive interpretation of "regulate" in Tarr v. Tarr.[42] Section 3 of the Domestic Violence and Matrimonial Proceedings Act 1976 was enacted as a cure:

> 3. Amendment of Matrimonial Homes Act 1967
>
> In section 1(2) of the Matrimonial Homes Act 1967 (which provides for applications for orders of the court declaring, enforcing, restricting or terminating rights of occupation under the Act or regulating the exercise by either spouse of the right to occupy the dwelling-house),-
>
> (a) for the word "regulating" there shall be substituted the words "prohibiting, suspending or restricting"; and
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> (b) at the end of the subsection there shall be added the words "or requiring either spouse to permit the exercise by the other of that right."

So section 1(2) of the Matrimonial Homes Act now reads as follows:

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[40] E.g. Hill v. Hill [1916] W.N. 59

[41] Under the Married Women's Property Act 1882; see Lee v. Lee [1952] 1 All E.R. 1299, Halden v. Halden [1966] 3 All E.R. 412.

[42] [1973] A.C. 254.

> (2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or prohibiting, suspending or restricting the exercise by either spouse of the right to occupy the dwelling-house or requiring either spouse to permit the exercise by the other of that right.

This section reverses the effect of the House of Lords decision in Tarr v. Tarr; if the husband is the sole owner of the matrimonial home his wife may apply to the court for an order prohibiting the husband from occupying the matrimonial home. Should the husband by command or conduct force his wife out of the home, she may apply for a court order requiring the husband to permit the exercise by the wife of her rights of occupation. Thus the wheel has turned full circle. Whereas the common law had respect only for strict property rights, statute has now abrogated them in favour of the needs of family law, namely to secure a roof over the heads of spouses and their children who have been deserted or who have been subjected to violence.

B. The right of the husband to occupy the matrimonial home vis-a-vis his wife.

(1) at common law and in equity

Before the doctrine of separate use there was never any question of the husband being in a position of weakness. But once equity had created the doctrine of separate use it was possible for the wife to bar the door. In keeping with the discrimination of the times, it is submitted that the husband was in a stronger position in relation to his wife's separate property than she was in relation to his, when title was in his name alone and when the property in issue was the matrimonial home. The husband's right to the consortium of his wife and the "corelative duty of the wife to give her society and services to the husband - a view which was not entirely obsolete in the middle of the 19th century[43] -" helps to explain the dicta of Cotton L.J. in Symonds v. Hallett:[44]

> In my opinion it will have to be seriously considered whether the separate use which is a creature of equity entitles a wife to exclude her husband from the place where she is residing, and from coming there to exercise the *rights* he has as a husband.... My view is this, that the separate use was not created by a Court of Equity in any way to enable a wife to prevent the husband from exercising his rights and duties as a husband except by preserving property for her.

In 1924 Atkin L.J. echoed Cotton L.J. in Shipman v. Shipman when he said:[45]

> It is the duty of husband and wife to live together, and if one or the other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to

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[43] Bromley, supra n. 18 at 109.

[44] (1883) 24 Ch. D. 346 at 351.

[45] [1924] 2 Ch. 140 at 146.

> exclude her husband from the matrimonial home, she seeks to get the Court to enable her to evade a duty. Therefore I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger. So perhaps, in normal circumstances, the husband may have a right to enter the matrimonial home for duties which it is not only his right to demand but his duty to render,...

It is interesting to note that it was seemingly more difficult for the wife to exclude her husband from the matrimonial home than it was for the husband to exclude the wife.[46]

What these cases do show is equity recognising rights which were not recognised at common law. The common law would have lent the wife no assistance had she argued in 1883 that she had the right to enter the matrimonial home solely owned by the husband to enjoy the matrimonial consortium once the husband had barred her from the door. Equity only assisted the wife in relation to her own separate property and if that property was the matrimonial home, equity expressed reluctance to exclude the husband.

(2) the position today

A wife has long been able to hold property in her own name without invoking the doctrine of the married women's separate use. However the wife has never been under a duty to support her husband at common law. She did have a duty to live with her husband which equity recognised. Statutory reform, however, made it clear that the time had come for marriage to be recognised as a partnership[47] and whether title was in the husband's name or in the wife's name, the spouse without the legal interest was given registrable rights of occupation. The Matrimonial

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[46] See e.g. the device of the fictitious lessee in Doe d. Merigan v. Daly, supra n. 5.

[47] See J.E. Todd and L.M. Jones, Matrimonial Property (1972) 38ff.

Homes Act 1967 and its amending legislation have been discussed above.[48] The point is that a husband now has statutory rights of occupation if he does not have a legal right to occupy. He may register his rights of occupation[49] and may apply to the court for an order restricting his wife's right to occupy the matrimonial home, even though title is in her name alone. Such an order may also be obtained if title to the dwelling-house is in joint-names.

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[48] See heading A.(5) above.

[49] S. 2(1) as amended by the Matrimonial Proceedings and Property Act 1970, s. 38 and by the Land Charges Act 1972, s. 18(1) and Schedule 3.

C. The right of the wife to occupy the matrimonial home vis-a-vis third parties.

(1) at common law and in equity

As described in section A above,[50] at common law a wife had at best a personal right against her husband to occupy the matrimonial home. This right was virtually worthless when third parties intervened. Consequently the Court of Appeal, starting in 1952,[51] established the proposition that a wife could enforce her right to occupy a matrimonial home against third parties claiming through the husband, unless they were bona fide purchasers for value without notice of her rights.[52] This "deserted wife's equity" was put to rest by the House of Lords in National Provincial Bank v. Ainsworth.[53] The deserted wife's equity cases of Bendall v. McWhirter,[54] Street v. Denham[55] and Jess B. Woodcock & Sons v. Hobbs[56] were overruled.

In counsel's submissions before the House, I.E. Goulding, Q.C.[57]

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[50] At page 1 of my text.

[51] Bendall v. McWhirter [1952] 2 Q.B. 466.

[52] See generally, Bromley, supra n. 18 at 483-487.

[53] [1965] A.C. 1175.

[54] Supra n. 51.

[55] [1954] 1 W.L.R. 624.

[56] [1955] 1 W.L.R. 152.

[57] Counsel for the National Provincial Bank Ltd. which was the third party in this case.

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exposed the inconsistency of the doctrine with this observation:[58]

> There are a number of errors in the doctrine as it now stands. (1) One of the mistakes is the assertion that a fundamental change takes place on desertion as regards the wife's relation to the matrimonial home or to the husband's house. There is no authority for any such fundamental change before *Bendall* v. *McWhirter*. The true view is that it is the duty of the spouses to live together. If the husband breaks that duty by parting from his wife she still has the right to have his company and it is still his duty to return to her. She is still in his house because she is his wife waiting for his return. That is the right principle and, therefore, the husband can no more turn her out after his desertion that he can before. He cannot plead his own wrong. But she has no *higher* right. That is the fundamental error in *Bendall* v. *McWhirter*. There is no magical change in the position on desertion. Thus, if while the spouses are living together the husband goes bankrupt the trustee in bankruptcy must be under a duty to sell the matrimonial home. In those circumstances the husband and wife would have to leave. It cannot make any difference that the husband has deserted his wife before bankruptcy occurs. The trustee in bankruptcy has the same right and the wife cannot assert any equity against him or against a mortgagee or purchaser. The present position is anomalous for it cannot be disputed that if the husband goes bankrupt *subsequent* to his desertion and *thereafter* returns to his wife the trustee in bankruptcy could sell the matrimonial home with the aforementioned consequences.

The House agreed with counsel on this point. As Lord Hodson said:[59]

> On the other hand there is no reason why the wife should be in a better position if the husband becomes a bankrupt after leaving her than she would have been if his bankruptcy had taken place while they were living together.

Later Lord Hodson concludes:[60]

> Having reached the conclusion that the rights which have been referred to as those of a "deserted wife" are of their nature personal rights and such that they cannot be treated as in any sense running with the land, I am

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[58] [1965] A.C. 1175 at 1189, 1190.

[59] *Id.* at 1222.

[60] *Id.* at 1225.

> of the opinion that those cases which proceed on the basis of an opposite conclusion were wrongly decided.[61]

There was, however, some small measure of protection afforded to the wife at common law and in equity. Lord Wilberforce outlined the "factors" in Ainsworth:[62]

> The deserted wife, therefore, in my opinion, cannot resist a claim from a "purchaser" from her husband whether the "purchase" takes place after or before desertion. As regards transactions subsequent to the desertion this disability is somewhat mitigated by three factors. First, if it appears that the husband is threatening to dipose of the house in such a manner as to defeat her rights, she may be able to obtain an injunction to restrain him from doing so (Lee v. Lee).[63] An injunction is, of course, a discretionary remedy and it does not follow that the wife will be granted it in every case, but in suitable circumstances she has this protection. Secondly the courts have ample powers to detect, and to refuse to give effect to, sham or fraudulent transactions -- such as that which was attempted in Ferris v. Weaven.[64] Thirdly there are some extensive powers conferred by statute [Matrimonial Causes (Property and Mintenance) Act 1958][65] to set aside dispositions aimed at defeating the wife's right to maintenance: these powers were in fact used in the present case to set aside the husband's transfer of the house to a company, and they go some distance towards protecting the legitimate claims of deserted wives. As regards those cases (and I recognise that they may exist) which fall outside, the deserted wife may be left unprotected -- she may lose her home. As to them, it was said by Roxburg J. in Churcher v. Street:[66] "It would have been an advantage, in my view, if Parliament, rather than a higher court, had intervened, because in order to prevent certain cases of injustice to deserted wives, a position has been

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[61] To the same effect see Lord Upjohn at 1239A and Lord Wilberforce at 1248, 1249 and 1256-1258.

[62] Id. at 1258.

[63] [1952] 2 Q.B. 489n.

[64] [1952] 2 All E.R. 233.

[65] See the Matrimonial Causes Act 1973, s. 37 which replaced the 1958 Act.

[66] [1959] Ch. 251 at 258.

> brought about which may produce considerable injustice to other people unless each case is brought before the courts, which is a course involving considerable expenditure.

The wife's position, therefore, was precarious. After Ainsworth a husband could sell the property over the wife's head and provided the transaction was bona fide and the wife did not prevent it by injunction, the purchaser could eject the wife. Similarly, if the husband became bankrupt or defaulted on mortgage payments the wife who remained in the matrimonial home had no right to prevent the sale of the matrimonial home. In this impossible situation involving the needs of competing interests, Parliament intervened.

(2) statutory intervention

In 1967 Parliament gave wives a chance to remain in the matrimonial home by creating a registrable interest capable of attaching to land. This move made it more difficult for an unscrupulous husband to get his wife out of the matrimonial home.

The Matrimonial Homes Act 1967 has been examined in part above.[67] Section 1 draws a sharp distinction between a spouse who has a *right to occupy* (by virtue of a legal estate, interest, contract or by virtue of the Rent Acts[68]) and a spouse who has *rights of occupation* (viz. a spouse not legally entitled to remain in occupation.) Accordingly, section 2 provides:

> (1) Where, at any time during the subsistence of the marriage, one spouse is entitled to occupy a dwelling house by virtue of an estate or interest, then the other spouse's

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[67] See heading A.(5) above.

[68] Rent Act 1977.

> rights of occupation shall be a charge on that estate or interest, having the like priority as if it were an equitable interest created at whichever is the latest of the following dates, that is to say -
>
> (a) the date when the spouse so entitled acquires the estate or interest;
>
> (b) the date of the marriage, and
>
> (c) the commencement of this Act.

Section 2(1) gives the spouse with rights of occupation the ability to charge the other spouse's legal estate or interest. The registration takes priority as an equitable interest.[69] Section 2(7) of the Land Charges Act 1972 states that such a charge is registrable as a Class F Land Charge. Section 2(7) of the Matrimonial Homes Act provides that if the land is registered (and by no means all of the land in England and Wales is registered)[70] then the spouse with rights of occupation may register a notice or caution.

Registration has proved to be a valuable asset for wives with rights of occupation. For the purposes of discussion it will be assumed that the wife is in occupation of the matrimonial home and legal title is in the husband's name. The Matrimonial Homes Act, however, applies equally to husband and wife, so that if legal title were in the wife the husband would be in no better or no worse a position.

For a number of years a wife who was not in occupation of the matrimonial home could not register a land charge, if leave of the court under section 1(2)(b) of the 1967 Act had not been obtained first.[71] This restriction was dispensed with by the Court of Appeal in Watts v. Waller.[72] Although a wife may need leave of the court to enforce her right to return to the matrimonial home in the face of an unwilling husband, nevertheless she is still able to register a land charge. As Bromley has written:[73]

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[69] In Snell's Principles of Equity (27th ed. 1973) the authors state at 529 that "the charge seems to be sui generis, being neither legal nor equitable but purely statutory, and of an uncertain nature."

[70] See generally, R.E. Megarry and H.W.R. Wade, The Law of Real Property (4th ed. 1975).

> As a wife out of occupation may need even greater protection than a wife physically in the house (for example, if she has been constructively deserted), her charge may be registered even though she has not been given leave by the court to enter and occupy.

There are however, several restrictions and drawbacks. By section 3 of the Act a spouse may only register a charge against one dwelling-house at a time. The charge must be cancelled if the marriage comes to an end unless the court orders it to continue.[74] More serious than duration is a drawback hilighted in Miles v. Bull.[75] In that case Megarry J. said[76] that the Matrimonial Homes Act contained nothing which required a husband to give prior notice of any proposed transaction to the wife with rights of occupation so that where a wife did not learn of a transaction till too late the Act provided no protection to her. It is stated in Halsbury:[77]

> a spouse should accordingly be advised to consider whether to register as soon as matrimonial affairs reach a stage

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[71] See Baynham v. Baynham [1969] 1 All E.R. 305 at 308 per Davies, L.J., Rutherford v. Rutherford [1970] 3 All E.R. 422.

[72] [1973] Q.B. 153.

[73] Supra, n. 18 at 485.

[74] S. 5.

[75] [1968] 3 All E.R. 632.

[76] Id. at 634.

[77] 42 Halsbury's Laws (3rd) 1600.

> where there appears to be any risk of a dealing with the house to that spouse's disadvantage.[78]

In a recent report of the Law Commission[79] Megarry's criticism of the Act was examined and no redress of the situation was recommended. The report states:[80]

> But the main problem lies in the absence, as we see it, of any adequate sanction to ensure that the husband always complied with his duty. Plainly, it would not be right to deprive the wife of the right to register after contract if she did not find out until then: unless, of course, it were also provided that in the absence of any prior notice from her husband her occupation right would bind a purchaser whether she had registered it or not. And that would be grossly unfair to the purchaser. A criminal sanction is out of the question; and a right to damages payable to the wife (even if quantifiable, which must be doubtful) seems to be wholly inappropriate.[81] A right of occupation, if it means anything at all, means a right of occupation and not a sum of money.

So the situation remains. If the wife does not know of her husband's plan to sell the matrimonial home and fails to register before completion of the sale, she may find that she has no home and that her husband has disappeared.

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[78] (No. 2) [1969] 3 All E.R. 1585.

[79] Law Commission No. 86, Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods, 13th June, 1978.

[80] *Id*. at 634.

[81] *Cf*. the situation adopted by the Canadian common law provinces under the Dower Acts (e.g. The Dower Act, R.S.A. 1970, c. 114); of course, no rights of occupation are given under these Acts and in Alberta, if the matrimonial home is sold over the wife's head without her consent, damages against the husband is the usual remedy. In Alberta, therefore, facility of transfer is given priority over rights of occupation. See Section II.C(2)(a) below.

Further drawbacks can best be illustrated by the types of third parties in turn to see what measure of protection a wife is given.

(a) the purchaser

Provided the wife registers a charge before completion of the sale, her charge will bind purchasers. Of course, if the charge is registered after the sale, it will be void. Even if valid, the purchaser may apply under the Matrimonial Homes Act to terminate the wife's rights of occupation. It is noted in Halsbury:[82]

> in the absence of a contrary intention expressed therein, it is to be a term of any contract for the sale, exchange, lease or underlease of a house against which a Class F land charge is registered whereby the vendor agrees to give vacant possession on completion, that the vendor will before completion procure the cancellation of the registration of the charge at his expense, save where he is entitled to sell freed from the charge.[83]

There have been cases where the husband has not been able to persuade the wife to remove the charge. Registration, therefore, can impede transactions effectively and purchasers tend to shy away from buying houses which are encumbered with Class F land charges. As we have seen above, just as a husband need give no notice of his intention to sell, so too can a wife register a charge or notice without notifying her husband. This can have dire consequences and in Wroth v. Tyler[84] the owner was liable to pay damages by failing to complete a sale owing to the fact that his wife would not vacate the notice she had registered.

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82. 42 Halsbury's Law (3rd) 1600.

83. See Matrimonial Homes Act 1967, s. 4.

84. [1974] 2 Ch. 30; for comments on this case, see S.M. Cretney, "Caveat Uxorem" 177 Sol. Jo. 475, D.G. Barnsley, "Conveying the Matrimonial Home" (1974) Current Legal Problems 76, and D.J. Hayton, "The Femme Fatale in Conveyancing Practice" 38 Conv. (n.s.) 110.

The problem illustrated by Wroth v. Tyler was recently considered by the Law Commission in its Third Report on Family Property.[85] The report recommended some changes to the Matrimonial Homes Act 1967[86] but came to the conclusion that the situation which arose in Wroth v. Tyler should not be remedied by future amendment to the Matrimonial Homes Act. The facts in Wroth v. Tyler were as follows. Mr. Tyler contracted to sell the matrimonial home to the Wroths. Communication between Mr. and Mrs. Tyler was not good - Mrs. Tyler was opposed to any sale but Mr. Tyler appears to have thought that his wife had relented and now acquiesced in the sale of the home. The day after the contract was entered into, Mrs. Tyler registered a notice of her rights of occupation in the Land Registry.[87] This registration prevented Mr. Tyler from completing the sale and substantial damages were awarded to the Wroths. As the Law Commission noted:[88]

> In the face of his wife's continued refusal to remove her notice, it looked when the hearing ended as though Mr. Tyler would have to be made bankrupt so that the bungalow would pass to his trustee in bankruptcy who could then, under a special provision in the 1967 Act, sell it free from Mrs. Tyler's rights.[89]
> 2.76 The result in Wroth v. Tyler seems clearly to have been a disaster for all concerned - for the purchasers because they bought a lawsuit instead of a bungalow, for Mr. Tyler because he was in a fair way to being made

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[85] Supra n. 79; see also the Report of the Committee on One Parent Families (1974) Cmnd. 5629, known as the Finer Report.

[86] Embodied in the Matrimonial Homes (Rights of Occupation) Bill, Law Com. No. 86 at 274ff.

[87] Pursuant to the Matrimonial Homes Act 1967, s. 2(7) as amended by the Land Charges Act 1972, s. 18(1) and Schedule 3.

[88] Law Com. No. 86 at para. 2.75.

[89] S. 2(5) of the 1967 Act.

> bankrupt and losing not only his sale but a large part of his modest assets as well, and even for Mrs. Tyler because in the end it looked as though her registration would avail her nothing and she would have to leave the bungalow.... A more unfortunate situation could not easily be imagined but it was, on any view, a very exceptional one, and the problem was aggravated by the phenomenal rise in house prices which happened to occur during the period in question. Even so, we must consider those provisions of the 1967 Act which provided the setting for this case with a view to deciding whether they can be amended in such a way as to prevent a similar situation from arising in the future.

The Law Commission pointed out that if a Wroth v. Tyler fact situation occurred again there would not be protracted litigation.[90] The Commission also took some comfort from the fact that in the vast majority of cases the wife usually agrees to any sale of the matrimonial home. When a wife does not agree to a sale, the Commission had this to say:[91]

> Part of the philosophy underlying the 1967 Act is that one spouse ought not to dispose of the matrimonial home without the consent of the other;[92] the statutory occupation rights bind the owner spouse whether they are registered or not, and so they go some way to ensuring that the owner spouse actively seeks, and obtains, the other's consent. If that consent is not forthcoming the sale should not take place, unless the court is prepared to make an appropriate order under section 1(2) and (3) of the 1967 Act, terminating the statutory rights. There are, in our view, no grounds for sympathising with a husband who proceeds to enter into a contract, which he may not be able to perform, in the face of his wife's known objections....

The Law Commission did have sympathy for the Act and recommended no changes. In speculating the circumstances where a wife might abuse her rights under the Act (i.e. by agreeing to a sale and then changing her mind and registering) the Commission decided that sections 1(2), (3) and

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[90] Law Com. No. 86 at para. 2.77.

[91] Id. at 2.78.

[92] Cf. the Dower Acts (supra n. 81) which have espoused this philosophy for the better part of this century.

6 of the 1967 Act (and possibly an argument based on estoppel) provide adequate safeguards against abuse by the wife of her right to register. The Commission made a significant point when it said:[93]

> the exercise by her of her right to register a Class F land charge is not rendered an abuse merely because it may interfere with smooth conveyancing. It is an essential step in protecting her substantive rights and we think that to introduce restrictions on that exercise would be contrary to the policy of the Act.

There is no doubt that the policy of the Act is to put the right of occupation on a higher plane than strict property rights.

The Commission's treatment of further academic and judicial criticism of the 1967 Act was not so convincing. The Court of Appeal in Watts v. Waller[94] and Megarry J. in Wroth v. Tyler[95] criticised the Act for the absence of any provision requiring the Land Registry to notify the husband of any rights of occupation charges registered by the wife. The Commission met the objection with this comment:[96]

> There is, however, a positive reason for not notifying the husband of the registration of his wife's rights. Just because such registration is not common form, but is usually resorted to only when the relationship between the spouses is not as it should be, registration is liable to be interpreted as a hostile act, and a wife (anxious to preserve, and indeed improve, the marriage) may well not wish to tell her husband that she has registered. Notification by the Land Registry may, in these circumstances, be worse in so far as it suggests that the wife has acted in a manner not merely hostile but underhand. Fears for the marriage itself should not be permitted to inhibit the wife from protecting her interests and we are satisfied that the "family" considerations (which will be a factor in most cases) outweigh

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[93] Law Com. No. 86 at para. 2.83.

[94] Supra n. 72.

[95] Supra n. 84.

[96] Law Com. No. 86 at para. 2.86.

> any advantage there may sometimes be, from the conveyancing point of view, in automatically notifying the husband of Class F entries. We accordingly endorse the present practice of not giving such notice.

This is not compelling logic. Surely the failure to notify before it is often too late (as in Wroth v. Tyler)[97] will be regarded as an even more hostile and underhand act. Far better for the husband to learn sooner than later. If the marriage is going to break up upon an early notification, it would have no prospect of survival under the no-notification-until-Land-Registry-is-searched procedure.

The law relating to purchasers and the matrimonial home is not due to be changed. If the wife registers a Class F land charge she can remain in the matrimonial home unless the husband is able to cancel the charge by court order[98] or is made bankrupt[99] for failure to complete.

(b) the trustee-in-bankruptcy[100]

A wife has no rights of occupation when the husband becomes bankrupt. Section 2(5) of the 1967 Act provides that where a husband is adjudged bankrupt or makes a conveyance of his property to trustees for the benefit of his creditors or dies and his estate is insolvent, then even if the wife has registered a charge, that charge will be void against the trustee in bankruptcy or the trustees under the conveyance or his personal representatives. Bromley makes this pertinent observation:[101]

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[97] The problem in Wroth v. Tyler would be alleviated if spouses had to register pre-contract rather than pre-completion, however, by section 24 of the Law of Property Act 1969, Parliament has attempted to eliminate pre-contract searches at the Land Registry; see Law Com. No. 86 para. 2.88.

[98] Matrimonial Homes Act 1967, s. 1(2) and 2(2).

[99] See the special provisions re trustees-in-bankruptcy at heading C. 2(b) below.

[100] See generally, C. Palley, "Wives, Creditors and the Matrimonial Home" 20 N.I.L.Q. 132 and J.G. Miller, "Creditors and the Matrimonial Home 119 Sol. Jo. 582.

> One sees here another example of the principle that the claims of the husband's creditors are to be preferred to those of his wife: one can also see the anxiety of the legislature that the creditors should not be defrauded by the register of a charge intended to defeat their claim to the property.

(c) trustees

The situation envisaged here is one where the husband occupies the matrimonial home pursuant to the terms of a trust. There is some confusion in this area as the Law Commission has recently revealed.[102] Despite the fact that the Land Registry allows registration against the trustees' estate and that in Miles v. Bull (No. 2)[103] registration against the trustees' estate was assumed, the Commission felt that a husband cannot really be said to occupy by virtue of an estate or interest under section 2(1) of the 1967 Act. In reality, the husband is occupying by virtue of the trustees' estate. When the trustee is the husband, the Act allows registration by the wife.[104] If, however, the husband is not the trustee, then it is arguable that a wife has no registrable rights of occupation and therefore no security. The Commission have recommended substantial changes in this area[105] stating that the wife's rights of occupation should normally be a charge on the trustees' estate, although not in every trust case.

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[101] Supra n. 18 at 485.

[102] Law Com. No. 86 at para 2.7.

[103] [1969] 3 All E.R. 1585.

[104] Law Com. No. 87 at para. 2.10.

(d) mortgagees

There are problems in this area too and a wife is often in a weak position.[106] Seldom will a wife register a charge before a mortgage on the matrimonial home is obtained and if she does register in time, a prudent mortgagee will invariably seek priority before concluding a mortgage. The only protection a wife is given under the Act is afforded by section 1(5) which provides that where a spouse with rights of occupation makes any payment towards the satisfaction of any liability of the owner spouse in respect of rents, rates, mortgage payments or other outgoings affecting the matrimonial home, those payments will be as good as if made by the owner spouse. Thus the wife has a right to make mortgage payments assuming that she knows they are not being met by her husband. If the payments accumulate, the wife may be in an impossible situation[107] with no ability to meet the arrears and therefore no right to remain in occupation of the home. This problem is compounded because the mortgagee does not have to give the wife any notification about her husband's default and furthermore the wife is not entitled to be joined in proceedings instituted by the mortgagee for possession.[108] Thus very often if a husband fails to make mortgage payments the wife can lose her rights of occupation.

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[105] Matrimonial Homes (Rights of Occupation) Bill, s. 1, Law Com. No. 86 at 276.

[106] Cf. those provinces with homestead legislation where dower rights are usually postponed in favour of mortgagees.

[107] The court can only stay an order for possession if the wife is able to pay arrears within a reasonable time; Administration of Justice Act 1970, s. 36; Administration of Justice Act 1973, s. 8 and see also Halifax Building Society v. Clark [1973] Ch. 307; Western Bank v. Schindler [1977] Ch. 1. The court does not take into account "the possibility that at some uncertain future date the wife might conceivably be in funds to redeem the mortgage" and on those grounds will not postpone the mortgagee's rights to possession; see Hastings and Thanet Building Society v. Goddard [1970] 1 W.L.R. 1544 at 1548 per Russell L.J. giving the judgment of the court.

As with trustees, the Law Commission has recommended wholesale changes in this area; in particular it would like the wife to have "the power to apply to the court to be made a party in any action brought by the mortgagee to enforce his security."[109] The Commission also endorsed the 1971 Working Paper proposal[110] that if a wife of a mortgagor had protected her rights of occupation by registration under the 1967 Act, the mortgagee should be obliged to give the wife notice of proceedings for possession, thus enabling the wife to exercise her right (which the Law Commission hopes to establish by amendment to the Matrimonial Homes Act 1967) to be joined as a party. Ideally a wife in that situation will be able to find the funds so as to prevent a possession order from taking place.

(e) landlords

Many of the matrimonial homes in England and Wales are rented and many are subject to the various and ever-changing provisions of the

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[108] See Hastings and Thanet Building Society v. Goddard [1970] 1 W.L.R. 1544.

[109] Law Com. No. 86 at para. 2.26.

[110] Law Commission, Published Working Paper No. 42, Family Property Law, 26 October, 1971.

Rent Acts.[111] The whole policy which underlies the Rent Act 1977 is being investigated by the Department of the Environment,[112] however it is certain that the present protection afforded to spouses will be improved. As above, for the purposes of discussion it will be assumed that the husband has the lease in his name alone, thus giving the wife rights of occupation. The most important provision is section 1(5) of the Matrimonial Homes Act 1967 which gives the wife a right to pay the rent should her husband fail to do so, and such payment by the wife is as good as payment by the husband. It matters not whether the tenancy is covered by the Rent Acts or not.[113] Section 1(5) also provides that if the husband is, for example, a statutory tenant, desertion by him leaving the wife in the flat will not terminate the statutory tenancy, as the subsection states that a spouse's rights of occupation shall for the purposes of the Rent Act 1977 (other than Part V and sections 103 to 106) be treated as possession by the other spouse.[114] So provided the wife is in occupation of the tenancy, this is deemed to be occupation by the tenant himself.

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111. See generally R.E. Megarry, Rent Acts (10th ed.) 72ff and see the Rent Acts of 1965, 1968, 1974 and 1977.

112. See Law Com. No. 86 at 250 n. 51.

113. See generally F.R. Crane, "After the Deserted Wife's Licence" 29 Conv. (n.s.) 254, 464. At 264 Crane states that if the tenancy falls outside of the Rent Acts, then it would seem that a husband-tenant could by deed or in writing surrender his tenancy to the landlord, just as he could assign it, and that in neither case could a deserted wife remain in occupation.

114. The Law Commission pointed out at 252 n. 58 that "if the statutory tenant was the husband (as we have assumed) possession by his spouse was always treated as possession by him, but this seems not to have been so in the converse case until s. 1(5) made the rule sexually indiscriminate."

Problems have arisen when the wife in occupation has not paid the rent and the landlord has brought an action for possession. Section 100 of the Rent Act 1977 gives the court a wide discretion to, for example, stay actions for possession, but once an order is actually made, the husband no longer has a right to occupy and the wife, accordingly, no longer has rights of occupation under section 1 of the 1967 Act. The result of this situation is that the wife cannot invoke section 1(5) at all and so the statutory tenancy will end.[115] The problem exists because a wife cannot ask for a stay of execution of the order under section 100 of the Rent Act 1977[116] whereas the husband, as tenant, could have done so. The Law Commission has recommended that:[117]

> neither the bringing of proceedings for possession nor the making of a possession order should affect the right of the wife to apply, by virtue of section 1(5), for the exercise of the court's powers under section 100 of the Rent Act 1977.

This provision, if it is adopted by Parliament, will save the wife from losing protection under the Rent Acts and will strengthen her rights of occupation against landlords.

(3) the husband's right to occupy the matrimonial home vis-a-vis third parties when the wife owns or leases the property

All that has been written in this section about the wife's position in relation to third parties applies equally to the husband. The Matrimonial Homes Act does not discriminate in favour of one spouse over the other. If the wife owns the matrimonial home, the husband can register a Class F land charge or notice or caution with all the consequent protection that that affords against purchasers from the wife. And just as the wife is in a somewhat weaker position in relation to trustees, mortgagees and landlords, so too is the husband. Needless to say, the changes which the Law Commission have recommended in their draft "Matrimonial Homes (Rights of Occupation) Bill" will apply to the husband as well as the wife giving them equal protection, though it remains to be seen if the draft Bill will be adopted by Parliament.

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[115] See Penn v. Dunn [1970] 2 Q.B. 686.

[116] In Penn v. Dunn the relevant statutory provision was the Rent Act 1968, s. 11.

[117] Law Com. No. 86 at para. 2.45.

D. The right of the spouse to terminate the other spouse's occupation of the matrimonial home.

As many marriages today turn into contracts of violence,[118] it is vital that spouses should be able to use the law in such a way as to protect themselves from harm. Adequate protection was not afforded until quite recently as the common law was more concerned with strict property rights and only reluctantly came to the aid of spouses, who, though subjected to violence, had no legal rights in the home in which they lived. Nevertheless the injunction restraining one spouse from molesting the other or excluding one spouse from the matrimonial home altogether came to be used more and more, but it was hedged in with conditions and restrictions as we shall see below. Certainly any order which evicts a spouse from the matrimonial home is a drastic remedy[119] but it is also a very vital one when spouses and their children are victims of violence or are subject to constant agony through the cruelty of the other spouse. In the Report from the Select Committee on Violence in Marriage[120] there were some horrifying examples of violence in marriage. One example out of many given suffices to demonstrate the seriousness of the problem.[121]

> For example, a Mrs. X gave oral evidence anonymously on 12th March.... She was beaten up frequently over a period

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[118] See generally John Eekelaar, Family Law and Social Policy (1978) 19ff; there is no reason to believe that marital violence is a new phenonmenon; see Holmes v. Holmes (1755) 2 Lee 116, 161 E.R. 283.

[119] See Akingbehin v. Akingbehin (1964) 108 Sol. Jo. 520 per Willmer L.J.

[120] H.C. Session 1974-1975, 30 July, 1975.

[121] Id. at para. 10.

> of sixteen years before she left her husband. In her own words "I have had ten stitches, three stitches, five stitches, seven stitches, where he has cut me.... I have had a knife stuck through my stomach; I have had a poker put through my face; I have no teeth where he knocked them all out; I have been burnt with red hot pokers; I have had red hot coals slung all over me: I have been sprayed with petrol and stood there while he flicked lighted matches at me....in the middle of the night he would drag me out of bed and start hitting me, he would do it in front of the children. He never bothered if the children were there...I have been to the police. I nicked my husband. He gave me ten stitches, and they held him in the nick over the weekend and he came out on Monday. He was bound over to keep the peace, that was all. On Tuesday he gave me the hiding of my life.

The Select Committee went on to examine the law of England and Wales. Under the heading "Injunction" this was their report:[122]

> We accepted the evidence from women and lawyers that civil injunctions restraining husbands from assaulting their wives, or ordering husbands to leave and keep away from the matrimonial home, were on occasions "not worth the paper they were written on", as the present enforcement procedure of applying for the man to be committed to prison was too slow adequately to protect the woman concerned.

The Select Committee also stated:[123]

> It is not satisfactory that at present women have either to start divorce proceedings or judicial separation proceedings, or undertake to the court to do so, before they may obtain an injunction.... The only other present means of obtaining an injunction is by claiming one in the High Court in an action founded on assault: in the County Court damages must also be claimed for injury or loss occasioned by an assault. This is to some extent used by cohabitees who do not have access to the Divorce Courts, but is not used, according to the President of the Family Division, Sir George Baker, by married women.

The Domestic Violence and Matrimonial Proceedings Act 1976 has remedied this situation and an examination of this area shows that the reform was long overdue. The courts' pre-occupation with founding jurisdiction and worse still, its fascination with strict property rights no doubt encouraged Parliament to enact legislation which was more concerned with the needs of families who were victims of violence.

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[122] Id. at para. 46.

[123] Id. at para. 47.

In this section I have attempted to present the categories wherein injunctions may be granted in as clear a manner as possible. Before the new legislation, which will be examined at the end of this section, there were various ways in which a spouse could exclude his or her partner from the matrimonial home; the devices ranged from strong arm tactics to obtaining a court order. As legal rights were pre-eminent for so long, I have started this section with a brief statement of the position of spouses in matrimonial homes solely owned by either husband or wife. This is followed by an examination of the powers of spouses in jointly-owned matrimonial homes. I have attempted to look only at the availablity of powers to exclude which are peculiar to the particular legal right, such as *orders for sale* under the Law of Property Act 1925 where the matrimonial home is jointly owned and which, of course, are not available outside of joint-ownership. This is followed by a detailed treatment of those powers which either spouse may involve, *irrespective of ownership,* such as injunctions ancillary to divorce proceedings or section 17 applications. These unsatisfactory powers lead naturally on to the more modern legislation.

(1) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where it is owned by the husband

(a) the husband's powers at common law

Under the old common law the husband could evict his wife through the device of a fictitious lessee.[124] When that fiction was abolished a husband could no longer sue for possession, as until 1962, spouses could not sue each other in tort.[125] Nevertheless, the husband could bar the door or adopt the "medieval method of taking her by the scruff of the neck and throwing her out"[126] and there was very little the wife could do, except perhaps to seek restitution of conjugal rights[127] or apply for maintenance. Now that spouses can sue each other in tort, a husband could sue for possession but he would be unlikely to succeed unless he supplied adequate maintenance or alternative accommodation.

(b) the wife's powers at common law and in equity

The wife could not terminate her husband's legal right to occupy his property[128] at common law and equity followed the law in this matter. So if the wife was treated badly, her only recourse was to leave the matrimonial home. In this century the courts, under their inherent powers, have begun to give the wife some protection although statute has now rendered these powers less important. As we shall see below, if a wife petitioned for divorce or judicial separation, there was the possibility that the courts would grant a threatened wife an injunction. This was done in Silverstone v. Silverstone[129] where the husband was excluded from the home which he owned at law pending trial. Pearce J. stated:[130]

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[124] Doe d. Merigan v. Daly (1846) 8 Q.B. 934, 115 E.R. 1126.

[125] R.E. Megarry and H.W.R. Wade, The Law of Real Property (4th ed. 1975) 1006 n. 15 wrote that "an action for the recovery of land, because of its descent through ejectment from trespass, is still regarded as an action in tort and so was held not to lie between husband and wife before the Law Reform (Husband and Wife) Act 1962; Bramwell v. Bramwell [1942] 1 K.B. 370 at 372 doubted in National Provincial Bank v. Ainsworth [1965] A.C. 1175 at 1235."

[126] Middleton v. Baldock [1950] 1 K.B. 657 at 662 per Evershed M.R.

[127] Supra n. 20.

> It is not necessary here to decide the exact nature of a wife's right or to say that it goes to the full extent of the words quoted. In my view she has a right to be in the matrimonial home while a petition is pending before this court, and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband go back to the house I am really driving her out.

Of course, such an injunction is a temporary measure although under the present divorce law[131] the courts have power[132] to exclude the husband from his property for all time.[133]

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[128] In Doe d. Merigan v. Daly (1846) 8 Q.B. 934 at 938, Lord Denman C.J. stated: "the relation of husband and wife certainly does not justify her in taking forceable possession of his property to his exclusion."

[129] [1953] P. 174.

[130] Id. at 177.

[131] Matrimonial Causes Act, 1973.

[132] Id. s. 24.

[133] See Hanlon v. Hanlon [1978] 2 All E.R. 889 where a transfer of the matrimonial home soley owned by the husband was made to the wife.

(2) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where it is owned by the wife

(a) the wife's power at common law and in equity

As we have seen above[134] the cases of Shipman v. Shipman[135] and Symonds v. Hallett[136] show that equity will come to the assistance of a wife who wishes to exclude her husband from her property, provided that such a measure is needed to protect that property. Equity would not allow the wife to evade easily her duty to live with her husband. It might be thought that pending trial for divorce, a wife who owns the matrimonial home might be in a strong position to exclude her husband from the matrimonial home, however the case of Gorulnick v. Gorulnick[137] shows that this is not so. The facts warrant the injunction. As Morris L.J. said in the case:[138]

> it seems to me that this case does not, therefore, depend on the fact that the wife is the owner of the house. I agree entirely that the court has wide powers, pending the hearing of a petition, to make orders that seem right.... But in the present case it does not seem to me that the judge would have been warranted in granting an injunction.

The wife's power to exclude her husband from her home through statute will be discussed below.

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[134] Heading B.(1).

[135] [1924] 2 Ch. 140.

[136] (1883) 24 Ch. D. 346.

[137] [1958] P. 47.

[138] Id. at 53.

(b) the husband's position

Although equity was reluctant to exclude the husband from property which the wife owned and which happened to be the matrimonial home, neither equity nor the common law ever entertained a husband's suit to exclude the wife from her own property.

(3) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where it is jointly owned

A spouse who has a legal interest in the matrimonial home has a right to occupy it. The property, however, will be held on trust for sale so that either spouse can apply to the court for an order by virtue of the Married Women's Property Act 1882, s.17 or the Law of Property Act 1925, s.30 directing that the property be sold. This remedy could be a pyrrhic victory if both parties were left homeless and in Williams v. Williams[139] the Court of Appeal stated that questions about the matrimonial home should be dealt with under the wide powers of the Matrimonial Causes Act 1973 and not under the more ancient provisions of the Married Women's Property Act 1882 and the Law of Property Act 1925. The older provisions, however, are used and the result can mean the exclusion of both spouses from the home through sale, unless one is able to buy the other's share.[140]

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[139] [1977] 1 All E.R. 28.

[140] This was done in Bothe v. Amos [1975] 2 All E.R. 321; see also Rawlings v. Rawlings [1964] P. 398, Jones v. Challenger [1961] 1 Q.B. 176, Jackson v. Jackson [1971] 3 All E.R. 774, Burke v. Burke [1974] 1 W.L.R. 1063.

Other than judicially discouraged provisions for sale of the jointly-owned matrimonial home, there has been a suggestion that one joint-owner can exclude the other from entering the home by injunction. This was established in Gurasz v. Gurasz in which Lord Denning said:[141]

> What then is the position in this case? In the first place the wife has a proprietary right in the house. She is joint owner with her husband. By virtue of her joint-ownership, she has a right to occupy the house by herself and her children. The courts can certainly enforce that right by allowing her to re-enter the house and by preventing the husband from interfering with her exercise of that right. It is true, of course, that the husband is also a joint-owner, and by virtue thereof, the husband has a right to occupy it. But that is a right which the courts, for the protection of the wife can restrict; just as they can restrict his right if he were sole owner. Such a power to restrict arises out of her personal right, as a wife, to occupy the house. If his conduct is so outrageous as to make it impossible for them to live together, the court can restrain him from using the house, even though he is a joint-owner.

Lord Denning cites no authority for this proposition and in Tarr v. Tarr[142] Joseph Jackson, who was counsel for the successful husband in that case, argued that Gurasz v. Gurasz was wrongly decided:[143]

> There is no power at common law or in the Matrimonial Causes Act 1965 to exclude the owner of a house except pending suit. The statement of Lord Denning M.R. in Hall v. Hall (1971) 1 W.L.R. 404, 406c, following Gurasz v. Gurasz, is also wrong.

The House of Lords did not deal with Jackson's argument as to the correctness of Lord Denning's dicta in Gurasz, but the House did find that there was no power under the Matrimonial Homes Act 1967 to exclude an owner spouse from the matrimonial home and this, of course, led to the amendment in 1976. The House's finding tends to suggest that Jackson was right about the common law.[144] In any event, it is not of real importance since the Domestic Violence and Matrimonial Proceedings Act 1976 now allows the courts to restrict a joint-owner's legal right to occupy the matrimonial home.[145] As for Gurasz, it can be said that it filled a gap which existed in the Matrimonial Homes Act for a number of years.[146]

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[141] [1969] 3 All E.R. 822 at 824.

[142] [1973] A.C. 254.

[143] Id. at 257.

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144. Joseph Jackson deduces the state of the common law in 1973 to be as follows (id. at 257, 258) "From National Provincial Bank Ltd. v. Hastings Car Mart [1965] A.C. 1175 the following basic propositions can be derived: (1) two basic concepts flow from the status of marriage; the right and duty of the spouses to live together and the duty of the husband to maintain the wife. (2) A wife entering a matrimonial home which is the property of her husband has no rights even inchoate, in that home which the law will recognise or protect. (3) Since the court recognises the obligation of the spouses to live together, it will only make orders with regard to the occupation of the matrimonial home subject to those obligations. (4) Where the home is the husband's house the wife has no right to exclusive occupation as against the husband. (5) The fact that the husband treats the wife with cruelty or is guilty of some other "matrimonial offence" does not confer or purport to confer on the wife the right to any property other than that which she had before the offence. (6) At common law, while the wife had the right, forfeitable in certain circumstances, to occupy the matrimonial home, there was no cause of action giving her the right to eject him where the home was his or does section 17 of the Married Women's Property Act 1882 give her such a right. (7) The common law will protect, in appropriate cases, the separate property of the wife, so that, for example, if a husband misbehaves the court may enjoin him to leave the matrimonial home which is the wife's property, or vice versa. (8) Different considerations arise once a matrimonial cause is subsisting. There, the court will, pending suit, ensure that pressure is not put on a spouse to abandon his or her petition by evicting that spouse from the house. (9) A non-cohabitation clause in favour of the wife does not impose a duty on her to leave the matrimonial home, nor does it give her a right to exclude the husband from it." Propositions (1) to (6) have been examined above and the remaining ones will be discussed below.

145. S. 4.

146. There is no doubt that the wife also could have filed for divorce and obtained a similar injunction ancillary to the matrimonial cause. This procedure is discussed in the next section below.

(4) the power of the spouse to terminate the other spouse's occupation of the matrimonial home irrespective of ownership

(a) restraining orders ancillary to divorce proceedings or other matrimonial causes

(i) General Principles

In Rayden on Divorce it is stated:[147]

> An injunction may be granted when it is just and convenient.... The claim to an injunction must arise out of or be incidental to the substantive relief sought in the proceedings.

For injunctions regulating the occupation of the matrimonial home, both Rayden and Halsbury's Laws are agreed as to the basic principles:[148]

> The court will only grant an injunction to support a legal right or for the welfare of the children. When a matrimonial suit is pending and even after final decree but not after the petition has been dismissed the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation; but there is no general rule that, pending the hearing of a matrimonial suit, either party has an absolute right to remain in the matrimonial home; every case in which a question arises on this matter must be dealt with according to its individual facts. Unpleasantness, inconvenience and tension pending a divorce are not sufficient grounds for ordering a spouse out of the matrimonial home.

These are the general propositions. It is worth noting that the type of injunction with which this thesis is concerned primarily is one excluding the husband from the matrimonial home. The non-molestation injunction,[149] however, does not allow one spouse to force the other out of the matrmonial home.[150] Furthermore, a noticeable reluctance on the part of the judiciary to grant an injunction excluding the husband from the matrimonial home can be discerned from an examination of the case law. On commentator has said:[151]

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[147] (12th ed. 1974) 903.

[148] Id. at 906; 13 Halsbury's Law (4th) 579 ff.

[149] I.e. one containing a non-cohabitaton clause.

> A distinction must be drawn between an injunction which merely restrains one spouse from molesting the other, and one which orders him to leave the property. Judges are usually willing to grant the former but some have demanded a serious degree of risk to the wife before ordering the husband's eviction.

What the commentator did not point out is that there are cases where a battered wife can only obtain the husband's eviction if in addition to her injuries, she has a legal right to live in the matrimonial home. This additional requirement seems to exist only where the injunction is sought after final decree.

The situation is illustrated by the decision in Montgomery v. Montgomery where Ormrod J. stated:[152]

> In the present case the wife has a right not to be molested but I cannot find that she has any legal right to exclude her husband from the flat. She is entitled to occupy the flat as the wife of the tenant but she has no priorietary right in it.... A decree of judicial separation is not an order that the respondent shall cease to live with the petitioner; it is an order that the petitioner be no longer bound to cohabit with the respondent. In these circumstances the wife could not establish her right to an injunction excluding the husband from the flat, in any other division of the High Court. The result is, in my judgment, that in the circumstances of this case I have...no jurisdiction to make a mandatory order excluding the husband from the flat.

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[150] See Tarr v. Tarr [1973] A.C. at 258 per Joseph Jackson, Q.C., counsel for the husband in that case.

[151] Mary Hayes, "Evicting a spouse from the matrimonial home" (1978) 8 Family Law 4 at 41.

[152] [1965] P. 46 at 51; italics mine.

> The position would be quite different if proceedings were still pending.... This court in its matrimonial jurisdiction has to control situations and problems during the pendency of proceedings which are peculiar to it, and consequently at that stage cannot have too nice a regard for strict property rights: Silverstone v. Silverstone per Pearce J.[153] Similarly, if the welfare of the children was in jeopardy different considerations would apply. In such cases the court has wide powers to intervene for their protection.
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> On the evidence before me the husband is deliberately interfering with the wife's use of the flat and unless restrained will continue to do so until she and the two children are virtually compelled to leave. I am therefore prepared to grant her an injunction to restrain the husband from molesting her and from interfering with her use and occupation of the flat. *If I had power to do so I would certainly have ordered the husband to leave the flat....* The court has already made a finding of cruelty against the husband, thereby holding that it is not reasonable or just to expect the wife to continue to live with him.

It is not exactly clear why there should be a distinction between powers pending suit and powers after the decree. The facts in Montgomery were simple enough. The wife had been granted a decree of judicial separation but afterwards the parties continued to live in the same flat. The wife sought an injunction subsequently, restraining the husband from molesting her and moreover, excluding the husband from living in the flat. The wife was granted the non-molestation injunction only. The court had no jurisdiction to exclude the husband because the wife had no legal right[154] to live in the flat. In Montgomery Ormrod J. purported to apply Robinson v. Robinson[155] were Karminski J. held that he had jurisdiction to grant an injunction restraining molestation and excluding the husband from the home under the Supreme Court of Judicature (Consolidation) Act 1925.[156] The learned judge ordered that:[157]

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[153] [1953] P. 174, 177.

[154] Supreme Court of Judicature (Consolidation) Act 1925, s. 45(1).

[155] [1965] P. 39.

> the husband shall be hereafter restrained from entering the matrimonial home and from molesting or interfering with the petitioner and from entering the street in which she lives until further order, notwithstanding the making of a decree absolute.

There is little doubt that the difference between the cases is slight. The cases seem to turn on the fact of who was legally entitled to occupy the matrimonial home.[158] In Robinson the former wife was tenant of the matrimonial home and a decree absolute had been made whereas in Montgomery the husband was sole tenant and a decree of judicial separation was involved. In the latter case Ormrod J. stated:[159]

> (Robinson v. Robinson) is authority for the proposition that this court can restrain one party from molesting the other after a decree of judicial separation because there is no relevant distinction between that decree and a decree absolute - but it is not, in my judgment, authority for further proposition that the court can, in the circumstances of this case, order the respondent to leave the matrimonial home.

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[156] S. 43: "The High Court...shall, in every cause or matter pending before the court, grant...all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them..., so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."
S. 45: "(1) The High Court may grant...an injunction...in all cases in which it appears to the court to be just or convenient so to do."

[157] [1965] P. 39 at 46. Earlier in his judgment Karminski J. had said that an injunction could be extended beyond decree absolute although "authority on extension beyond the decree absolute seems to be singularly lacking." Id. at 42.

[158] This is unfortunate for despite clear evidence of cruelty in Montgomery, legal rights were held to be the deciding factor.

[159] [1965] P. 46 at 49.

In Brent v. Brent[160] Dunn J. applied Montgomery:

> His Lordship did not accept these submissions (that Montgomery was decided wrongly) and would follow Montgomery. The wife's right to occupy the matrimonial home during marriage did not continue after it had been dissolved, and could not be protected by injunction if she had no proprietary right in the premises.

A note which follows Brent illustrates the confusion which some commentators have met in this area:[161]

> [Note: In Gurasz and Jones (supra) Davies L.J. cited the words of Lord Denning in Silverstone [1955] 1 All E.R. 556 "In an extreme case, if the husband's conduct is so outrageous as to make it impossible for them to live together, the court will order him to go out and leave her there. This is a personal right, which belongs to the wife as wife." ...In Mamane (ante, p.87) Stamp L.J. said that to exclude a spouse from a house in which he had a beneficial interest was "a drastic measure". In Hall (1971) 1 Fam. Law 40, such an order was described by Lord Denning as "most drastic". ...Sachs L.J. said the essence of the question was "Is it necessary for the children's protection?" (cf. Aking Behin (sic) (1964) 108 Sol. Jo. 520).
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> These decisions are not consistent; each seems to depend on its own facts, since the granting of an injunction is always discretionary. In the instant case the former wife is "robust, strong-minded and earning"; the children are grown up; the husband a sick man. The one point in the judgment of Dunn J. which we venture to question is the words "The court has no jurisdiction after decree absolute to grant an injunction excluding the husband from premises wholly owned (sic) by him." Phillips (supra) is a decision of the Court of Appeal to the contrary; aliter Mamane (supra).]

With respect, Phillips is not a decision to the contrary for the parties in that case were joint-tenants and the court founded jurisdiction on special basis that the children were in need of protection.[162] Counsel for the husband in Phillips conceded jurisdiction and did not attempt to mount an argument as in Brent or Montgomery re legal rights being paramount after final decree in the absence of children. Had he attempted such an argument he would have failed as the case of Stewart, which possibly conflicts with Brent,[163] established the principle that where children were in need of protection, as in Phillips, the court will exclude a property owner from his home. However neither in Montgomery nor in Brent were the children, who were grown up, in need of protection. The note goes on to cite Mamane as a case wherein there is a distinction. In fact, the distinction is fundamental as proceedings were pending in that case.[164]

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[160] (1974) 4 Family Law 157.

[161] Id. At 157, 158.

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[162] Courts with common law traditions possess "an overiding 'best interest' jurisdiction based on the concept of parens patriae or 'parent of the state'. It gives an inherent responsibility to the High Court representing the Crown to oversee the welfare of the children within the Crown's territory. In many instances this jurisdiction enables the High Court to stand as the ultimate protector of children with supervisory powers over any of their custodians." See Jeffery Wilson, Children and the Law (1978) 2; see also 8 Halsbury's Laws (4th) para. 901; Butler v. Freeman (1756) Amb. 301, 27 E.R. 204 per Lord Hardwicke L.C. "(this court) has a general right delegated by the Crown as pater patriae, so (sic) interfere in particular cases, for the benefit of such who are incapable to protect themselves." And see 27 E.R. 206 n. 2; see also Spindlow v. Spindlow (1979) 1 All E.R. 169 at 172d per Ormrod, L.J.

[163] In Stewart Baker P. suggests that the court does have jurisdiction to grant an injunction excluding the husband from the home which he owns after decree absolute, however Stewart can be distinguished on the grounds that proceedings were pending that that case (viz. an order for financial provision.)

Thus Montgomery suggests that after decrees of judicial separation, nullity or divorce have been granted the courts are reluctant to exclude cruel spouses from property which they own in the absence of children who are adversely affected. Such cases are no doubt rare but there are occasions when a shortage of funds and accommodation force divorced or judicially separated couples to share the same house. In cases where matrimonial causes are pending, the courts seem to be more willing to exclude even property owners from their own homes. The idea behind this willingness was expressed by Ormrod J. in Montgomery:[165]

> A party has a right to pursue his or her remedies in court free from pressure or threats of pressure to abandon or modify the proceedings and free from intimidation in any form, and the court will interfere by injunction to ensure that a party is not prevented or discouraged by superior force from obtaining justice.

But as we shall see, very often the spouse has been thwarted from obtaining justice by the courts' narrow view of when proceedings are pending.

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[164] The note to Mamane in 4 Family Law 87 states that "in the instant case of Mamane the report does not state whether proceedings were pending...." The writer of the note suggested that they were not pending. This conclusion is not supported by the case report. On 21 Februrary, 1974 the wife petitioned for divorce. Earlier on February 12 the wife obtained from the county court an order excluding the husband from the matrimonial home. The husband's appeal against that order was heard by the Court of Appeal on March 8. It is certain that a decree nisi would not have issued within 2 weeks! Even if it had, proceedings would still be pending as the decree had not been made absolute; see Robinson v. Robinson supra n. 155.

[165] Id. at 51.

(ii) Jurisdiction to grant an injunction pending suit

The rule is that matrimonial proceedings must be pending and that the injunction must arise out of the proceedings. In Des Salles d'Expinoix v. Des Salles d'Epinoix[166] a husband's application for an injunction was held not to be ancillary to the wife's application for maintenance and so his application was refused. There was no doubt that proceedings were pending but the court insisted that the application for an injunction must arise out of or be incidental to the substantive relief sought in the proceedings.[167] More surprisingly, in Winstone v. Winstone[168] it was held that a wife's request for an injunction excluding the husband from the matrimonial home was not ancillary to her application for leave to petition for divorce within the first three years of marriage.[169] As conduct of the husband is the reason why the wife applied for leave in the first place, it might be thought that an injunction protecting the wife from that conduct might be desirable. There is no doubt that this "sufficient nexus" test was capable of prolonging agony, as in Winstone. In 1973 two decisions[170] produced the opposite result in Winstone and injunctions were granted ancillary to applications for leave to petition within three years of marriage. As Hayes wrote about this situation:[171]

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[166] [1967] 2 All E.R. 539.

[167] The proposition that an injunction must be ancillary to the substantive relief claimed seems to derive from cases such as Carter v. Fey (1894) 2 Ch. 541 and Morgan v. Hart [1914] 2 K.B. 183; see also R.S.C. Ord. 29, r. 1. In Des Salles d'Epinoix v. Des Salles d'Epinoix Sachs L.J. said at 546 "It is neither right for the court, nor open to the court, to throw all normal procedural rules of practice out of the window into the Strand because the provisions of s. 45 and, so to speak, sit under some of of procedural "palm tree."

[168] [1960] P. 28.

[169] Matrimonial Causes Act 1973, s. 3(1) "...no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage..." unless per section 3(2) of the Act a judge allows an application for presentation of a petition for divorce within the first three years "on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent;..."

> It can be seen from these cases that the law had reached a state of some confusion over what proceedings must be pending before the court has jurisdiction to grant an injunction. It is here that the Domestic Violence and Matrimonial Proceedings Act 1976 will have a major impact. The court[172] now has jurisdiction to grant various types of injunction whether or not any other relief is sought in the proceedings. This development has several beneficial consequences; primarily it simplifies the legal proceedings and it should help to minimize delay. But it will also take the pressure off spouses and their legal advisers to file a petition for divorce or judicial separation without giving proper reflection to the question of whether it is really necessary to terminate the marriage.

The 1976 Act, where spouses can obtain injunctions without having to start divorce proceedings, will be dealt with below.

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[170] McGibbon v. McGibbon [1973] Fam. 170, [1973] 2 All E.R. 836, (non-molestation injunction only and doubts expressed about excluding a spouse from the matrimonial home); McLeod v. McLeod, The Times, 3 July, 1973, 4 Family Law 91, (ex parte application for a non-molestation injunction and an order restraining the husband from entering the matrimonial home was granted). In Ansah v. Ansah [1977] 2 All E.R. 638 at 642, the Court of Appeal stated that only where it is really necessary to act immediately should ex parte orders be made.

[171] 8 Family Law at 6, 7.

[172] The Act gives jurisdiction to the County Court. The High Court has been given similar jurisdiction by amendment of the Rules of the Supreme Court S.I. No. 532. The act came into force on June 1, 1977, by order made by S.I. No. 559. Quaere was this ultra vires s. 5(2)?

While injunctions may be granted pending suit, they can also be obtained after decree. As we have seen in Montgomery v. Montgomery[173] a decree of judicial separation had been granted and the court ordered the husband to restrain from molesting the wife, however it declined to grant the wife an injunction evicting the husband from the matrimonial home on the grounds that the court had no jurisdiction. However in the somewhat different fact situation of Stewart v. Stewart (1973)[174] where a divorce decree had been granted and where the husband had undertaken to leave the matrimonial home which he owned,[175] Baker P. stated:[176]

> I find that this court has jurisidction, not necessarily because the proceedings are still in being: not necessarily because this woman was a wife and a mother who has always been in possession, but because there are two young children who have to have a roof over their heads. In my view, their interests are such that the court ought to protect them and has jurisdiction to do so. Ormrod J. said so in Montgomery v. Montgomery (1965) P.46, 51
>
> > "Similarly, if the welfare of the children was in jeopardy different considerations would apply. In such cases the court has wide powers to intervene for their protection."
>
> So too Lord Denning M.R., in Gurasz v. Gurasz (1970) P.11, 16 where he said:
>
> > "Some features of family life are elemental in our society. One is that it is the husband's duty to provide his wife with a roof over her head: and the children too."
>
> In Adams v. Adams (1965) S.J. 899, I held that I had jurisdiction to make an injunction against a mistress because of the need to protect the interests of the children. For that reason alone I consider that the court could grant an injunction, if necessary, in this case...

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[173] [1965] P. 46.

[174] [1973] Fam. 21.

[175] Cf. Goodridge v. Goodridge, June 12, 1978. [1979] 1 Current Law, Unreported Cases, Court of Appeal (Civil Division).

[176] [1973] Fam. 21 at 23.

In Montgomery it is interesting to note that the welfare of the wife is seemingly not enough for the court to exercise its full powers. One is driven to the absurd conclusion that after a decree if a wife is being treated cruelly but has no legal right in the home, then in the absence of children who are also affected, all the court can do is grant a non-molestation injunction. In Phillips v. Phillips, where the wife sought to exclude the husband from the matrimonial home, of which they were joint tenants, after decree absolute, Edmund Davies L.J. said:[177]

> (counsel for the husband) accepts, in the light of the authorities (including Stewart v. Stewart), that not only has the court jurisdiction to make, under its inherent powers, the order sought in this case, but that the interests of the child as well as those of the while have to be taken into consideration.

In Phillips the wife did have a legal right to occupy but then so did the husband. Stephenson L.J. pointed out:[178]

> I am ready to accept for the purposes of this case the more restricted principle that no court ought to make such an order as we are asked to make unless it is proved to be neccessary for the protection of the health, physical or mental, of the divorced wife or any child of the marriage living with her. She cannot be allowed to gain sole occupation of the house for which he pays by scraping the bottom of the barrel to find complaints against her husband's past conduct or even its continuation since the decree absolute. A certain amount of tension between parents and children living together in a small house after a divorce granted on any ground is inevitable, and there must be many families who find that after a marriage is dissolved they have to grin and bear continuing to live in too close proximity to a man who has behaved in such a way that a woman cannot be expected to live with him.

In the result an injunction excluding the husband from the matrimonial home was granted. It is worth noting that the Domestic Violence and

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[177] [1973] 2 All E.R. 423 at 427.

[178] Id. at 428.

Matrimonial Proceedings Act 1976[179] will solve jurisdictional problems[180] in this area; the courts will not have to establish legal rights or interests of children in order to grant a former wife full protection from a violent former husband after decree.

(iii) Grounds for granting an injunction restraining one spouse from occupying the matrimonial home

Every case depends on its own facts.[181] As we have seen in Stewart v. Stewart above[182] when the welfare of the children is in jeopardy, the court will exclude a spouse from the matrimonial home. As Edmund Davies L.J. said in Phillips v. Phillips:[183]

> Counsel for the husband....said that it matters not that the wife, because of the situation in which she finds herself, is enduring mental torture; that this is quite immaterial to the question whether the relief sought should be granted, provided that the husband's conduct is not aimed at the wife and calculated to cause her to bring about that result. I have to reject that submission out of hand. I do not think that can be sound. If a child can be placed in jeopardy without blows being struck on him, so can the wife. I know of no authority for the propositon that blows have to be struck and that there must be physical assault before the health of a spouse may be considered to be endangered. Health can be improverished and imperilled by assaults of a mental kind just as much as by blows. And, according to the recent affidavit of Dr. Dawson, unless something is done very soon, both mother and child are going to be psychiatric wrecks. I think that this situation cannot be allowed to continued.

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[179] S. 1(2).

[180] The preferred solution would be for the wife to apply in her petition for a property adjustment order under the Matrimonial Causes Act 1973; s. 24; see Williams v. Williams (1977) 1 All E.R. 28.

[181] See Hill v. Hill [1916] W.N. 59, Gorulnick v. Gorulnick [1958] P. 47, Freedman v. Freedman [1967] 2 All E.R. 680.

[182] Supra n. 164.

[183] [1973] 2 All E.R. at 428.

This area of the law, however, has been plagued by guidelines which have evolved since 1971. In Hall v. Hall[184] Lord Denning said that an injunction excluding a spouse should not be made unless it proved "impossible" for the parties to live together. Subsequently in Bassett v. Bassett the court moved away from the "impossible" test.[185] The Court of Appeal stated that where the marriage had broken down and one of the spouses would inevitably have to leave the matrimonial home, then the court should not hestiate to grant an injunction merely because hardship would be inflicted sooner than later. In Bassett, Cumming Bruce L.J. suggested that the test was whether it was sensible to expect the wife and child to endure pressures which the continued presence of the other spouse would put upon them, after taking into account the accommodation available to both spouses and the hardship to which they will be exposed if the injunction is granted or refused. The latest guideline has appeared in Walker v. Walker.[186] The court propounded the test that whether a spouse should be excluded by injunction from the matrimonial home depended upon whether, in the light of all the circumstances, it was fair, just and reasonable. The case of Bassett was applied. Ormrod L.J. said:[187]

> It is now time, in my view, for the words "impossible" and "intolerable" in this context to be dropped. Those words are exceedingly vague; both of them can only be understood in the context of the facts against which they are used and they are, in my judgment, being misused in argument far too much.

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[184] [1971] 1 W.L.R. at 406.

[185] [1975] Fam. 76. (Although the "impossible" test was one of the tests used at 84B.)

[186] [1978] 3 All E.R. 141.

[187] Id. at 144, 145.

And this judge, who in Montgomery above felt so constrained by legal rights that he could not grant the wife in that case the relief which justice required said:[188]

> It is essential, in my judgment, that we stop this legalistic, artificial approach to the problem and look at the realities, terrible problems facing two human beings. The court has got to solve them in terms of human beings and not in terms of legal quibbles about the meaning of language.

This shift in attitude from a preoccupation with legal rights and language[189] to solving the serious problem of domestic volence is to be welcomed.[190] There is not doubt that the provisions of the Domestic Violence and Matrimonial Proceedings Act will become more popular than the injunction pending suit for reasons of jurisdiction, grounds, time and cost. But the injunction pending suit will still be used. The courts will no doubt watch carefully to see that it is not being used as a "tactical weapon"[191] in matrimonial conflicts, but in the serious cases the courts will exclude a spouse from the matrimonial home to save the occupying spouse and children from terrible problems pending trial of the matrimonial cause.

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188. Id. at 145.

189. As Ormrod J. points out (id. at 145) in relation to difficulties with language, the test in Walker "is by far preferable to asking these unreal questions about impossibility and intolerability. Of course the answer to each of those words depends on what you can tolerate, what is impossible? People have quite different reactions to these sorts of situations."

190. Cf. Parris v. Parris (1976) 6 Family Law 10, Singh v. Singh (1976) 6 Family Law 45 (No injunctions granted because situation was not impossible). Hayes at 8 Family Law 43 comments on these two cases stating that "the Court of Appeal, at least when Stamp L.J. and Pennycuick J. (sic) are sitting seems determined to tighten up upon the granting of injunctions.... It appears that some judges are being 'case-hardened' when dealing with domestic violence."

191. Bassett v. Bassett [1975] 1 All E.R. 513 at 521d per Cumming-Bruce J.

(b) orders ancillary to the Married Women's Property Act 1882, s.17

Before the advent of legislation giving the courts wider powers to settle property disputes between husband and wife and to protect spouses who were deserted or subjected to violence, section 17 of the 1882 Act[192] was used by some judges, notably Lord Denning, to achieve a justice not obtainable at law. In particular, when property was in issue, Lord Denning used the section to transcend legal rights.[193] This use of the section was curtailed by the House of Lords in National Provincial Bank Ltd. v. Ainsworth[194] where the House said that section 17 conferred merely "declaratory powers" on the courts and in Pettitt v. Pettitt[195] where the House emphasised that the section was procedural only and gave the courts no power to change existing property rights. In 1970 the courts were given by statute[196] the power to vary strict legal rights and there is no doubt now, therefore, that when property disputes arise on the breakdown of marriage, the spouse without proprietary rights is inevitably advised to use the court's wide powers under the Matrimonial Causes Act 1973.[197] Furthermore, spouses with legal rights to occupy the matrimonial home have been discouraged from using section 17. Since the new legislation, the defects in going under the 1882 provision have been amply demonstrated by recent case law.[198] In Fielding v. Fielding[199] the Court of Appeal stated in clear terms that section 17 applications should be used rarely. Ormrod L.J. said:[200]

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[192] Married Women's Property Act 1882, 45 & 46 Vict. c. 75, s. 17 - "In any question between husband or wife as to the title or possession of property, either party...may apply by summons or otherwise in a summary way to any judge of the High Court (or County Court)...and the judge...may make such order with respect to the property in dispute...as he thinks fit." (This also includes an order for sale of the property but see Williams v. Williams [1977] 1 All E.R. 28 where the Court of Appeal has stated that applications affecting the matrimonial home should be made to the Family Division of the High Court under the Matrimonial Causes Act 1973.)

[193] See Hutchinson v. Hutchinson [1947] 2 All E.R. 792, Hine v. Hine [1962] 3 All E.R. 345 at 347 per Lord Denning M.R. "The court's discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit." Appleton v. Appleton [1965] 1 All E.R. 44, Pettitt v. Pettitt [1968] 1 All E.R. 1053 (C.A.), cf. Bedson v. Bedson [1965] 2 Q.B. 666.

[194] [1965] A.C. 1175.

[195] [1970] A.C. 777.

[196] Matrimonial Proceedings and Property Act 1970, replaced by the Matrimonial Causes Act 1973.

> This court has said on a number of occasions, and will have to say it once again, that since the passing of the Matrimonial Proceedings and Property Act 1970 it is of very little value to proceed under the 1882 Act after divorce. It simply adds confusion and trouble and achieves nothing.... It seems a greaty pity that all the complications of trying to ascertain the parties' property rights should have been undertaken and pursued when the 1973 Act provides an elastic method of deciding what is a fair order in all the circumstances, adjusting property rights if need be, under the wide powers of the court. It is nearly always a purely theoretical exercise to try and determine the strict property rights of each spouse.

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197. See in particular section 24 which allows the court to transcend legal rights and to distribute property according to the guidelines in section 25.

198. See Kowalczuk v. Kowalczuk [1973] 1 W.L.R. 930 (wife had no interest in husband's property at common law and so section 17 was a waste of time and money. Wife given leave to reapply to the court under the Matrimonial Causes Act 1973, s. 24), Gordon v. Gordon, The Times, 12th October, 1973, Griffiths v. Griffiths [1974] 1 All E.R. 932 (Matrimonial Proceedings and Property Act, 1970, s. 37 used inappropriately).

199. [1978] 1 All E.R. 267.

200. Id. at 268.

In Fielding the courts below had ignored the wife's claim under the Matrimonial Causes Act and had proceeded under the claim of the 1882 Act. Fortunately for the wife she had applied for financial provision under the Matrimonial Causes Act and so the court, on appeal, was able to substitute an order under section 23 of the 1973 Act in the sum of £2000 for the judge's order under the 1882 Act.

Where advisors fail to apply for finanicial provision in a petition[201] then the 1882 Act may become the last unsatisfactory resort,[202] if a spouse should subsequently be barred from using the Matrimonial Causes Act.[203] Ormrod L.J. addressed this problem in Fielding:[204]

> There is, however, one aspect which in this case fortunately does not arise, to which I would draw the attention of all practitioners. If is this. If proceedings under the 1882 Act are pending, it is very important indeed that *both* parties should initiate, before they remarry, proceedings for a property adjustment order. Otherwise whichever of them remarries will be deprived of the benefit of the property adjustment order powers of the court. That is the effect of section 28(3) of the 1973 Act.[205] So it is of the

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[201] In a petition for divorce, for instance, the usual prayer is as follows: "That the court may order such payments by way of maintenance pending suit and may make such orders for financial provision and adjustment of property for the benefit of the petitioner as may be just."

[202] By the Matrimonial Proceedings and Property Act 1970, s. 39, divorced couples are able to use section 17 of the 1882 Act up to 3 years after decree absolute.

[203] See e.g. Nixon v. Fox (formerly Nixon) [1978] 3 All E.R. 995.

[204] [1978] 1 All E.R. 267 at 268.

[205] S. 28-(3) If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply, by reference to the grant of that decree, for a financial provision order, or for a property adjustment order, against the other party to that marriage.

> greatest importance that the provisions relating to the starting of proceedings for ancillary relief should be observed carefully by both husbands and wives in these cases if serious injustice is not sometimes to be caused.[206]

Thus the advent of new legislation has meant that section 17 applications, like orders for sale under the Law of Property Act 1925[207] and injunctions pending suit, are declining in importance. But where for some reason[208] a spouse is unable to use the Matrimonial Causes Act (perhaps because the spouse does not wish to obtain a divorce immediately) but where the spouse wishes to establish a property right in the matrimonial home, then the 1882 Act may prove to be useful. It is here where spouses have invoked the court's powers to exclude spouses in occupation

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206. For instance, a wife may have no legal right to possess the matrimonial home (as in Kowalczuk) under the 1882 Act whereas under the 1973 Act the court may decide to give the wife an outright transfer of it (as in Hanlon v. Hanlon [1978] 2 All E.R. 889). If the wife is barred from using the 1973 Act and is left to fall back on the 1882 Act, she could get nothing, hence the importance of drafting the prayer for relief in the petition property. In Suttil v. Graham [1977] 3 All E.R. 1117 at 1122 Ormrod L.J. suggested that s. 28(3) of the 1973 Act may be in need of amendment. In that case the court could not "adjust" the property rights in the husband's favor, as he had remarried, as had his former wife. Ormrod L.J. stated that "it is most unfortunate that the Court should be deprived of jurisdiction by a pure procedural formality." - *viz.* failure to include a prayer for property adjustment in the petition *before* remarriage.

207. *See* heading D.(3) above.

208. *See* for instance, *G.* v. *G.* [1973] 2 All E.R. 1187, *Bothe* v. *Amos* [1975] 2 All E.R. 321. The Matrimonial Homes Act 1967 or the Domestic Violence and Matrimonial Proceedings Act 1976 might allow the spouse to regulate the other spouse's occupation of the matrimonial home, but those proceedings would not enable her to establish a property right in the home. Of course, should a spouse not want a divorce, the establishing of an interest might be quite useful where that spouse wishes to obtain, for example a loan using an interest in the house as security.

from the matrimonial home. Section 17 allows the County or High Court judge to make such order as he thinks fit[209] and this includes injunctions.[210] As we have seen above, in Shipman v. Shipman[211] an injunction restraining the husband from entering the matrimonial home which was owned by the wife was granted ancillary to an application under section 12 of the Married Women's Property Act. This could also have been done under section 17.[212] We are concerned, however, with the situation where the spouses are joint-owners or where one spouse is seeking to establish an interest. In those circumstances the courts can regulate the occupation of the matrimonial home by injunction or equally effectively by an order for sale which can result in both parties having to leave the home. In Bedson v. Bedson[213] where under section 17 both spouses were equally interested in the matrimonial home, the court did not think it just to order a sale of the property which would have had the effect of terminating the husband's occupation of the home. And by injunction the court restrained the wife from dealing with her half share. This reluctance to make orders which terminate a spouse's occupation of the matrimonial home is nowhere more apparent than where a husband who owns the home seeks by section 17 to evict his wife.

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[209] For the procedure, see 13 Halsbury's Laws (4th) para. 802-805.

[210] See the Matrimonial Causes Rules 1977, S.I. 1977 No. 334, r. 104(9) "The registrar may grant an injunction in proceedings under the said section 17 if, but only so far as, the injunction is ancillary or incidental to any relief sought in those proceedings.

[211] [1924] 2 Ch. 140.

[212] Today the wife would have to proceed under section 17 as section 12 was repealed by the Law Reform (Husband and Wife) Act 1962. Section 1 of the 1962 Act allows spouses to sue each other in tort and so the wife in Shipman's circumstances today could also sue her husband for possession. By section 1(2) of the 1962 Act, the court has a discretion to stay the action and in any event can exercise section 17 powers where spouses sue each other.

[213] [1965] 2 Q.B. 666.

In Hutchinson v. Hutchinson[214] the husband sought possession of the matrimonial home of which he held the freehold but which was occupied by the wife, Denning J. stated:[215]

> It is contended for the applicant that, as he is the owner of the house, I must make the order for which he asks.... In my opinion, at common law the husband has no right to turn the wife out of the house.... He cannot sue her for ejectment, or trespass or for any other tort.[216] He has no right in law to claim possession from her except such as may be given him by section 17 of the Married Women's Property Act, 1882. But that section does not, in my opinion, give him the right which he is now claiming. It enacts that the Judge before whom the application comes may make such order as he thinks fit.... The parties are still husband and wife, and any disputes between them are to be decided, not by the formal legal title to property, but according to the discretion of the Judge under section 17.

In exercising his discretion, Denning J. decided that it would be unjust to turn the wife out of the home and so declined to make an order for possession.[217] The case shows that the court can order a spouse out of the matrimonial home under section 17 but where it is unjust to do so, the courts will not make such an order. Also in 1947 was a decision by the Court of Appeal in Stewart v. Stewart (1948).[218] The husband was tenant of the matrimonial home and he applied under section 17 to the County Court for an order that the wife should vacate the premises. The County Court granted the order which the husband had requested and the wife appealed to the Court of Appeal. The appeal was dismissed. Tucker L.J. said[219] that although the courts would be slow to make orders which might deprive either spouse of the right to occupy the matrimonial home, nevertheless the court does have the jurisdiction to make an order for possession. In Stewart the husband had petitioned for divorce on the basis of his wife's adultery and proceedings were pending. The Court of Appeal held that the County Court judge had not erred by taking this matter into consideration and concluded that it would not be right to interfere with the exercise of the judge's discretion.[220]

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[214] [1947] 2 All E.R. 192: sub nom H. v. H. 63 T.L.R. 645.

[215] 63 T.L.R. at 646.

[216] Since the Law Reform (Husband and Wife) Act 1962, this is no longer the case.

[217] In Hutchinson the wife claimed that her son was seriously ill and that to leave the matrimonial home would injure her son's health further. That consideration and the fact that the husband had bought alternative accommodation in which he was living with another woman no doubt affected the court's determination of what was just in the case.

The case of Stewart was considered in Lee v. Lee[221] where the wife applied to the County Court under section 17 for an injunction directing that she be permitted to occupy the matrimonial home (unless and until the husband provided suitable alternative accommodation) and that the husband should not sell the property so as to evict his wife and children. The injunction was granted and upheld by the Court of Appeal. In his judgment Somervell L.J. said that Stewart was an authority for the proposition that under section 17 the court can protect the possession of the wife and children of the matrimonial home, even though the husband was the owner of the property at law.

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[218] [1948] 1 K.B. 507.

[219] Id. at 507.

[220] It is interesting to note that the County Court judge did not make an order as in Hill v. Hill (supra n. 40) granting possession on terms that the husband should first provide alternative accommodation for the wife. The Court of Appeal held that although the judge could have stipulated those terms, his failure to do so did not mean that he had not exercised "his discretion in a judicial manner."

[221] [1952] 2 Q.B. 489n.

These cases show that the power of the owner spouse to evict his wife and children was a power which the courts were reluctant to enforce and very often the courts would restrict the husband's ability to deal with the property thus restraining him from achieving indirectly what he could not do directly by court order.[222] In Halden v. Halden[223] the wife obtained an order under section 17 restraining the husband, as in Lee v. Lee, from selling the matrimonial home without first providing her with alternative accommodation. Lord Denning reiterated his position which he had canvassed back in 1947:[224]

> it seems to me quite plain that as between husband and wife, if the husband deserts the wife, leaving her in the house, he has not a right to turn her out. She has not to show a legal or equitable interest in herself. It is sufficient for her to say: "I am his wife and I am under the roof which he provided." He is not entitled to turn her out except by order of the court; and that will not be given in the ordinary way unless he provides alternative accommodation for her.

Thus from a perusal of the caselaw, it can be see that section 17 applications proved to be infertile ground where spouses attempted to terminate the other spouse's occupation of the matrimonial home through orders for sale, orders for possession or orders by way of injunction, evicting a spouse from the home.

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[222] See the dicta of Somervell L.J., id. at 491.

[223] [1966] 3 All E.R. 412.

[224] Id. at 413.

(c) restraining orders under the Matrimonial Homes Act 1967 and the Domestic Violence and Matrimonial Proceedings Act 1976[225]

These new Acts have been mentioned above. Together they present a coherent body of law designed to mitigate the inadequacies of the old common law. In this section we are concerned only with the powers given to the courts under these Acts to terminate a spouse's occupation of the matrimonial home.

Before the passing of the Domestic Violence and Matrimonial Proceedings Act, it was clear from the decision in Tarr v. Tarr[226] that an owner-spouse with the sole legal right to occupy the matrimonial home could not be evicted from his property under the Matrimonial Homes Act.[227] The 1976 Act changed that[228] and now no matter who owns the matrimonial home[229] either spouse may apply to the court for an order prohibiting the other's occupation of the home.[230] If the spouses are joint tenants of the legal estate they must use the Domestic Violence and Matrimonial Proceedings Act. If the house is in the name of one spouse alone, no matter where the beneficial interests lie,[231] it would seem that the parties can invoke either the 1967 or 1976 Act.

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[225] The 1976 Act, referred to occasionally as the Domestic Violence Act, came into force on 1 June, 1977 by S.I. 1977 No. 559.

[226] [1973] A.C. 254.

[227] Although a dubious power at common law remained if the spouses were joint-tenants; see Gurasz v. Gurasz [1969] 3 All E.R. 822; see also Davis v. Johnson [1978] 1 All E.R. 848a-d per Lord Denning M.R.

[228] See section 3 of the 1976 Act and heading A.(5) above.

[229] See section 4 of the 1976 Act which has duplicated the common law power advocated by Lord Denning in Gurasz. This section, together with the additional powers under the 1967 and 1976 Acts, extends to all spouses whatever their legal rights are.

[230] For the procedure under section 1 of the 1967 Act, see 13 Halsbury's Laws (4th) para. 806, 807 and see now S.I. 1977 No. 344; for the procedure under section 1 of the 1976 Act in the High Court, see R.S.C. Ord. 90, r. 17 (added by S.I. No. 532 with effect from 1 June, 1977); for the county court procedure, see C.C.R. Ord. 46, r. 28 (added by S.I. No. 615 with effect from 1 June, 1977).

(i) when the legal estate is vested in one spouse only

The relevant section of the Matrimonial Homes Act, as amended, is section 1(2):

> So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or *prohibiting, suspending or restricting* the exercise by either to occupy the dwelling house *or requiring either spouse to permit the exercise by the other of that right.*[232]

As an example, this section means that a wife[233] with rights of occupation (that is to say, without the legal right to occupy) may apply to the court to prohibit her husband's legal right to occupy the home. In short, she can do what was impossible before. The husband, of course, can apply under the same section to terminate his wife's rights of occupation. Where the wife is the sole owner it will be interesting to see how the courts receive applications by husbsands to terminate their wives' right to occupy. The wife has never been under a duty to supply a roof over her husband's head but under the Matrimonial Homes Act the court does have power to protect a hsuband. There should no longer be reluctance on the part of the court to come to the aid of husbands in a proper case.[234]

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[231] See the Matrimonial Proceedings and Property Act 1970, s. 38.

[232] Words in italics added by section 3 of the Domestic Violence Act 1976.

[233] This section applies equally to husband and wife, though for the purposes of discussion it will be assumed that the husband is the violent spouse and that the wife is the victim.

It is to be noted that section 1(2) only applies where one spouse is legally entitled to occupy and where the other spouse is not. Joint tenants, therefore, are excluded from the operation of the Matrimonial Homes Act.

(ii) where the spouses are joint-tenants of the legal estate

The relevant provision is section 4 of the Domestic Violence and Matrimonial Proceedings Act:

> (1) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling-house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling-house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant.
>
> (2) In relation to orders under this section, section 1(3), (4) and (6) of the Matrimonial Homes Act 1967... shall apply as they apply in relation to orders under that section; and in this section "dwelling-house" has the same meaning as in that Act.
>
> (3) Where each of two spouses is entitled to occupy a dwelling-house by virtue of a contract, or by virtue of an enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.

One commentator has written[235] that this section amends the 1967 Act. Strictly speaking it is separate; an application by a joint-owner will be

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234. Cf. Calderbank v. Calderbank [1975] 3 All E.R. 33.

235. M. Hayes, 8 Family Law 45 n. 70.

made to the court under section 4 of the 1976 Act although the court will use the guidelines contained in the 1967 Act. It might indeed have been preferable if section 4 had been incoprorated into the 1967 legislation.

This section, together with section 1(2) of the 1967 Act, give to spouses, whatever their particular legal rights are, the opportunity to be protected from violence or intolerable situations of stress, affecting both them and children in their care, by court order. The merit of these sections is their accessbilility. Proceedings of any sort are not required and so cumbersome section 17 proceedings or orders for sale under the Law of Property Act or divorce proceedings will not be viewed as prerequisites. The 1967 and 1976 orders stand on their own and can be obtained swiftly from County Courts.[236] Furthermore the magistrates' courts may soon be able to make "personal protection orders" and "exclusion orders" under the Domestic Proceedings and Magistrates' Courts Act 1978. The relevant sections,[237] however, have not yet come into force.

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236. See the Matrimonial Home Act 1967, s. 1(6) "The jurisdiction conferred on the Court by this section shall be exercisable by the High Court or by a County Court...."

237. For the background to this Act, see Law Commission Working Paper No. 53 (published 1 December 1973) and Law Commission No. 77, Report on Matrimonial Proceedings in Magistrate's Courts (20 October, 1976) paras. 3.1-3.48 and see Stone, Family Law 71; for "personal protection orders" see s. 16(2) of the 1978 Act; for "exclusion orders" see s. 16(3). By s. 18 magistrates are empowered to attach a power of arrest to section 16 orders.

(iii) orders under the Domestic Violence and Matrimonial Proceedings Act 1976 irrespective of ownership

It would seem that there is some duplication[238] of the Matrimonial Homes Act by the Domestic Violence Act and possibly duplication within the 1976 Act itself. Section 1 of the 1976 legislation provides:

> (1) Without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely,-
>
> (a) a provision restraining the other party to the marriage from molesting the applicant;
>
> (b) a provision restraining the other party from molesting a child living with the applicant;
>
> (c) a provision excluding the other party from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included;
>
> (d) a provision requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home;
>
> whether or not any other relief is sought in the proceedings.
>
> (2) Subsection (1) above shall apply to a man and woman who are living with each other in the same household as husband and wife as it applies to the parties to a marriage and any reference to the matrimonial home shall be construed accordingly.

The duplication arises by virtue of the fact that under section 1(2) of the Matrimonial Homes Act a county court can make similar orders. Furthermore section 1 seems to cover the section 4 situation. Quite simply, in section 1 it does not matter whether the spouse is a joint-tenant, a sole owner or a spouse without a legal interest. Why then have all these sections? Was Parliament confused by the state of the law before 1976 and so sought to cover every possibility? There is certainly merit in section 1, especially its subsection 2. It is possible that construed liberally, this section will remedy the situation which occurred in Montgomery v. Montgomery.[239] If the parties are divorced but still living together this section could be used to obtain relief from a violent former spouse; this of course is not possible under the 1967 legislation where applicants must be married. But Parliament did not limit section 1 to use by cohabitees only and so the duplication exists. And although it is trite to say that section 1 is followed by section 2, it is this section which is the most significant one of the Act, giving the courts power to attach a power to arrest to matrimonial injunctions. Perhaps Parliament envisaged the section 2 power of arrest to apply only to applications under section 1 of the same Act, however the Court of Appeal has held that section 2 is completely general and not confined to applications under the 1976 Act.[240] Another possible reason for duplication has also been dispelled recently and that is that for a time it was thought that the Domestic Violence Act would be used only in situations of violence whereas the Matrimonial Homes Act would be used in less serious situations. It now appears that this is not the case.[241] In fact, judging from the reported cases the

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[238] There is nothing inherently wrong in having a variety of procedures available.

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[239] [1965] P. 46, [1964] 2 All E.R. 22.

[240] See Lewis (A.H.) v. Lewis (R.W.F.) [1978] 1 All E.R. 729 and see heading D.(4)(c)(iv) below.

[241] See Spindlow v. Spindlow [1979] 1 All E.R. 169 and see heading D.(4)(c)(vii) below.

Domestic Violence Act seems to be used exclusively.[242] It would appear that the real difference between section 1 and the other sections lies in the fact that under the 1967 Act the court has more ample powers to order, for example, payment of rent from one spouse to another.[243] This suggests that the 1967 Act is more conducive to settling the long-term occupation of the home. Support of this view can be found in Davis v. Johnson[244] where Viscount Dilhorne said that in the case of spouses, section 1 orders might in future be granted on the condition that it be followed by an application under the Matrimonial Homes Act 1967 and "it may be that a county court judge in the exercise of his discretion would grant an injunction until further order and would make it clear that it would lapse if no application was made under the 1967 Act...."[245] In many cases, however, where the only question is the occupation of the home, it may be an unnecessary expense for the applicant to go to court under the 1967 Act when section 1 could have been used by the court to dispose of the matter once and for all. This question involves times limits and conditions[246] which will be discussed below.

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[242] "The (1967) Act is not extensively used at all. In 1974 there were only 57 applications in the High Court including applications by owner spouses: in the same year in the county court only 44 applications by non-owner spouses were filed, of which 26 resulted in orders being made." See Law Com. No. 77 para. 3.27 n. 14. This is perhaps in part due to the affect which Tarr v. Tarr had on the 1967 legislation preventing owner-spouses from being excluded from the home. Although the Act has been amended it is not surprising that lawyers should look first at the new remedies contained in the Domestic Violence Act.

[243] See s. 1(3).

[244] [1978] 1 All E.R. 1132 at 1146.

[245] Id.

involves time limits and conditions[246] which will be discussed below.

(iv) when to use section 1 of the Domestic Violence and Matrimonial Proceedings Act in preference to the Matrimonial Homes Act, section 1(2) or the Domestic Violence and Matrimonial Proceedings Act, section 4

In Spindlow v. Spindlow[247] where the parties were an unmarried couple, Mr. Spindlow was ordered by the county court to vacate the matrimonial home. He applied to the Court of Appeal contending that as there had not been any appreciable violence on his part towards Mrs. Spindlow this was not a case coming within section 1 of the 1976 Act. Ormrod L.J. did not agree:[248]

> ...section 2 is expressly qualified by a reference to violence. Section 1 is not so qualified. So that it would be, on ordinary principles, surprising if it were right to construe section 1 as if it, too, were subject to a similar qualification in relation to violence. That is the substantial point of which counsel for Mr. Spindlow has to rely in support of this appeal: he has to say that section 1 should be read as though it were subject to some qualifying words importing violence, or some adverse conduct of that kind....
>
> There is, therefore, no difficulty at all about jurisdiction, so far as the High Court is concerned, whether the parties are married or unmarried. There is no difficulty, as I see it, in the county court if a petition for divorce is on the file. This section of the 1976 Act fills in the gap which arises in the county court where there are no divorce proceedings on the file,

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[246] I.e. should the applicant be obliged to petition for divorce as a spouse must do if granted an injunction in the High Court on an undertaking that a petition will be issued forthwith? It is interesting to note that in the Practice Note [1978] 2 All E.R. 1056 the President of the Family Division stated that the usual time limit for a section 1(1)(c) injunction is a period of up to 3 months.

[247] [1979] 1 All E.R. 169.

[248] Id. at 171.

> and therefore no suit which is pending to which an injunction can be attached. It gives the court power to grant an injunction without there being any other proceedings on foot. It is true that it can be said to be intended primarily as an emergency type of proceeding, and so it is; but, then, so are ex parte and interim injunction proceedings. So, as I see it, the discretion under section 1 is completely general and unfettered except by the application of ordinary common sense to the circumstances before the court.

Ormrod L.J. concluded that on the authority of the House of Lords in Davis v. Johnson[249] the correct way to operate section 1 is to make use of it on "a temporary basis, not interfering unduly with property rights, but making temporary adjustments pending alternative arrangements being made." It may be that section 1(2) of the Matrimonial Homes Act will be used where a more permanent solution is required.[250] The point is that violence is not a prerequisite so that duplication does exist in that a spouse with rights of occupation or a right to occupy can use section 1(2) of the 1967 Act as well as section 1 of the 1976. As for joint-owner spouses, they can use either section 1 or 4 of the 1976 Act. The only section which is truly unique is section 2 of the 1976 Act and it will be discussed below.

(v) statutory grounds for orders under section 1(2) of the Matrimonial Homes Act and section 4 of the Domestic Violence and Matrimonial Proceedings Act

Although the courts discretion under section 1 of the 1976 Act may be completely general and unfettered and governed only by common sense, the court's powers under section 1(2) of the 1967 Act and section 4 of the 1976 Act are fettered. The governing provision for section 1(2) and section 4[251] is section 1(3) of the Matrimonial Homes Act 1967:

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[249] [1978] 1 All E.R. 1132.

[250] Of course an adjustment of property order under the Matrimonial Causes Act 1973, s. 24 would be preferable where the marriage had broken down.

> (3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,-
>
> (a) may except part of the dwelling-house from a spouse's rights of occupation...;
>
> (b) may order an spouse occupying the dwelling house...to make periodical payments to the other in respect of the occupation;
>
> (c) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house.
>
> (4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in order or until further order.

It will be noted immediately that the court is required to take into account the conduct of the parties as well as the needs of the children. This, of course, is what the courts do when deciding to make orders pending trial of a matrimonial cause. One commentator, however, has put an interesting slant on section 1(3):[252]

> In my view this provisions lends itself to two different interpretations. If an application is made under the 1967 Act for the eviction of either spouse the Judges have two paths open to them. They can either adopt the approach which they have taken to exclusion injunctions and require evidence that it is "impossible" for the

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[251] Section 4(2) of the 1976 Act stipulates that orders made under section 4 are to be governed by the Matrimonial Homes Act 1967, s. 1(3), (4) and (6).

[252] M. Hayes, 8 Family Law 45.

> spouses to live together,[253] or they can follow the approach which has been taken on divorce.[254] Here conduct is of little importance and the courts have recently concentrated on balancing the parties' needs and resources bearing in mind their pre-existing property rights but not giving these great weight when faced with the need to provide the weaker members of the family with a home.[255]

The learned writer concludes:[256]

> By enabling the court to order the eviction of the spouse with the right to occupy and at the same time require him to repair, maintain or discharge any liabilities in respect of the house,[257] and by formulating criteria which do not concentrate on the impossibility of the spouses living together but rather on their respective needs and resources, the Act has a potential value to all those spouses who would like long-term occupation rights in the matrimonial home to the exclusion of the other spouse without taking divorce proceedings. That such spouses exist is amply demonstrated by the continuing use of the matrimonial jurisdiction of the magistrates courts. If the Law Commission's recent proposals are accepted[258] and the magistrates' jurisdiction is brought more into line with that of divorce the trend for poor people to apply to magistrates only and not to go on to obtain a divorce decree seems likely to continue.[259]

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[253] See Walker v. Walker [1978] 3 All E.R. 141 which has discredited this test.

[254] Matrimonial Causes Act 1973, s. 23-25.

[255] See particularly Browne v. Pritchard [1975] 3 All E.R. 721, Allen v. Allen [1974] 3 All E.R. 385, and Smith v. Smith [1975] 2 All E.R. 19.

[256] 8 Family Law 45. 46.

[257] Matrimonial Homes Act 1967, s. 1(3).

[258] Law Com. No. 77.

[259] Particularly now that legal aid has been withdrawn from undefended divorce petitions. (It should be noted that with effect from April 1, 1978, it is possible to obtain divorce by post in England and Wales).

It is just possible that section 1(2) and section 4 could be used to settle long term occupation rights by the courts but recent dicta, albeit directed at section 1 of the 1976 Act, suggests otherwise. In Hopper v. Hopper Ormrod L.J. stated:[260]

> ...the Domestic Violence and Matrimonial Proceedings Act 1976 is to be regarded as a short term remedy essentially. Of course in a case where parties have been married, and married for a long time, and the marriage has broken down an application under the 1976 Act is, to all intents and purposes, equivalent to an application for an interim injunction in divorce proceedings. So the principles are clear in that direction. But if the application is to be made under the 1976 Act alone with no intention of proceeding to divorce, or no immediate intention of proceeding to judicial separation, then the 1976 Act will, to all intents and purposes, operate as a substitute for an adjustment of property order under the Matrimonial Causes Act 1973.[261] Courts who feel it right to make orders under section 1 of the 1976 Act should, in my judgment, always have clearly in mind that they are dealing with the problem on a short term basis and that the injunctions which are granted should be either expressly limited in some way or it should be made perfectly clear to both parties that the protection of the injunction will be withdrawn after the lapse of a reasonable time, the reasonable time being time enough to enable the wife to make other arrangements for her accommodation or to take steps...to get her matrimonial status clarified, and to enable the court to exercise its powers to make property adjustment orders. If that is not done the 1976 Act will become a means of oppressing some people severely.

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260. [1979] 1 All E.R. 181 at 184, 185.

261. C.H. Sherrin, "Domestic Violence and Proprietary Rights" 8 Family Law 1976 at 178 took issue with Stamp L.J. in Cantliffe v. Jenkins [1978] 1 All E.R. 837 when the Lord Justice stated that injunctions under section 1 "unlimited in point of time, would be equivalent to a transfer of property order, continuing as long as the other party was living." Sherrin points out that as a matter of substantive law, "the injunction does not have this effect because such an injunction, although interferring with the enjoyment of rights by a property-owning spouse will not confer proprietary rights on the applicant." However as Ormrod L.J. points out in Hopper, although property rights are not conferred, an unlimited order amounts almost to the same thing!

This passage makes it quite clear that the Court of Appeal will not allow the county courts to usurp the function of the Divorce County Courts or the High Court to make property adjustment orders under the Matrimonial Causes Act in the guise of restraining orders under section 1 of the 1976 Act. This stand was fortified recently by a Practice Note issued by the President of the Family Division of the High Court. The note stated that when an injunction is granted under section 1 of the 1976 Act a time limit should be imposed and in most cases "a period of up to three months is likely to suffice." It is interesting to note that both in Hopper and in the Practice Note section 4 of the 1976 Act was not mentioned although in his judgment Ormrod L.J. referred to the 1976 Act as essentially a short term remedy. This echoes Lord Dilhorne's speech in Davis v. Johnson[262] where he said that the purpose of the Act was:

> the provision of immediate relief not permanent resolution of a situation arising on the break up of a marriage...

Nevertheless the dicta and Practice Note were inspired by section 1 of the 1976 Act which leaves open the possibility that section 1(2) of the 1967 Act and section 4 of the 1976 Act could be used to settle long-term occupation of the matrimonial home.

(vi) common grounds for terminating a spouse's occupation of the matrimonial home under section 1(2) of the 1967 Act or sections 1 or 4 of the 1976 Act

There is not doubt that the current trend is that the interests of the children of the household are the decisive factor.[263] In Spindlow v. Spindlow Ormrod L.J. made the laconic remark that the problem in that case was "essentially a housing matter, housing for the children."[264] In Spindlow Ormrod L.J. cited Bassett v. Bassett[265] which we have looked at in a similar context above and followed it with observation that "(t)his court has stressed many times that the court is primarily concerned in husband and wife cases of this kind with the welfare of the children." In Bassett the court did talk about the test being whether it was "impossible" or "intolerable" for the wife to live with her husband but as we have seen above the Court of Appeal in Walker v. Walker[266] has moved towards a fairer, though equally vague test, namely doing what in all the circumstances of the case seems just, fair and reasonable while paying special regard to the interests of the children. Although Bassett and Walker involved injunctions ancillary to matrimonial proceedings, the principles which they espouse apply equally to the orders under the 1967 and 1976 Acts. This is illustrated by Rennick v. Rennick[267] in what was one of the first cases to reach the Court of Appeal

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[262] [1978] 1 All E.R. 1132 at 1137.

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263. In Davis v. Johnson [1978] 1 All E.R. 841 at 876, Shaw L.J. suggested that in relation to exercising discretion under section 1 of the 1976 Act, where guidelines are not stipulated by Parliament as in the 1967 Act, the county court judge "will no doubt have regard to every relevant circumstance brought to his notice. What are the prospects of rehousing the applicant and any children in the family? What are the relative means of the applicant and the respondent? Where will the greater hardship lie if the order is made or if prolonged?"

264. [1979] 1 All E.R. 169 at 173.

265. [1975] Fam. 76, [1975] 1 All E.R. 513.

266. [1978] 3 All E.R. 141.

267. [1978] 1 All E.R. 817, See also Hopper v. Hopper [1979] 1 All E.R. at 184h-j per Ormrod L.J.

under the 1976 Act. The facts of the case were not as severe as some; the husband had behaved in an abusive and violent manner towards his wife. In July 1977 she told her husband that she was thinking about divorcing him and this led to one of the more serious incidents. As a result the wife left the matrimonial home with the 5 children of the family. Ormrod L.J. stated:[268]

> She left and took all five children to her mother's, where she is living in shocking conditions, the eldest child, Paula, sleeping in a double bed with the grandmother, the two boys and one of the girls sleeping in one of the rooms (two of them on a camp bed) and Elaine sleeping with her mother on a sun bed. The wife cannot stay there very long.

Sadly these circumstances are all too common. Ormord L.J. said:[269]

> So looking at this case with the children's interest paramount, as all these cases should be looked at, in my view, the order (forcing the father to leave) would inevitably go. Secondly, if the application had been made after a petition for divorce had been filed by the wife...it could be said on the history that this marriage had almost certainly broken down. The children's needs are such that they must have this flat.... So, approaching it in either of those two ways, the result is the same....

The learned Lord Justice concluded that his decision was based firmly on the welfare of the children. This concern for the needs of the children in this case is consistent with several Court of Appeal decisions on Family Law and Ormrod L.J. has usually given the leading judgments in those cases.[270] Spindlow v. Spindlow is the most recent example.

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268. [1978] 1 All E.R. 187 at 818.

269. Id. at 819.

270. See generally, Bassett v. Bassett [1975] 1 All E.R. 513, Browne v. Pritchard [1975] 3 All E.R. 721 and Walker v. Walker [1978] 3 All E.R. 141.

So the needs of the children together with obvious violence towards a spouse (and this will include mental harm) provide adequate grounds for the granting of orders under the 1967 and 1976 Acts. In fact, it is certain that if an injunction would be granted pending suit, it would certainly be granted under the new legislation. And it is possible to infer from cases such as Spindlow that circumstances not justifying an injunction pending suit may merit a temporary injunction under the 1976 Act.

(vii) attaching a power of arrest under section 2 of the 1976 Act

The 1976 Act arose out of the report of the Select Committee on Violence in Marriage.[271] In its report, the Committee highlighted the problems inherent in committing a violent spouse to prison. The process was simply too slow to be effective. The result was a recommendation that a judge should have the discretion to attach a power of arrest to restraining orders. Parliament gave effect to that recommendation by enacting section 2 of the 1976 Act:

> (1) Where, on an application by a party to a marriage, a judge grants an injunction containing a provision...-
>
> (a) restraining the other party to the marriage from using violence against the applicant, or
>
> (b) restraining the other party from using violence against a child living with the applicant, or
>
> (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included,
>
> the judge may, if he is satisfied that the other party has caused actual bodily harm to the applicant or, as the case may be, to the child concerned and considers that he is likely to do so again, attach a power of arrest to the injunction.

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[271] Supra n. 120.

> (3) If, by virtue of subsection (1) above, a power of arrest is attached to an injunction, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of such a provision of that injunction as falls within paragraphs (a) to (c) of subsection (1) above by reason of that person's use of violence or, as he case may be, of his entry into any premises or area.

This section is undoubtedly novel[272] as before this section came into force there was no jurisdiction to attach a power of arrest to restraining or exclusion orders.[273]

For a short time it was thought in some judicial circles that section 2 of the 1976 Act only applied where an application had been made to a county court for an injunction pursuant to section 1 of the same Act. The Court of Appeal[274] gave that notion its quietus in Lewis (A.H.) v. Lewis (R.W.F.).[275] Ormrod L.J., with whom Roskill L.J.

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[272] John Eekelaar, supra n. 118 at 80 "There appears to be no precedent for attaching a power of summary arrest to a civil injunction in domestic disputes in Commonwealth countries. The Alberta Court of Appeal on one occasion acknowledged that it had become customary for judges to attach an arrest power to non-molestation orders, but Arnup J.A. confessed that he was "somewhat at a loss" to discover authority on which such a direction could rest. See Mathieson v. Mathieson (1974) 48 D.L.R. (3d) 94.

[273] For the jurisdiction to attach a power of arrest to matrimonial injunctions, see the Cumulative Supplement (1978) to Halsbury's Laws (4th) Part 13 para. 1228A. The case of Ansah v. Ansah [1977] 2 All E.R. 638 e-g shows that a suspended committal order is very much akin to a section 2 power of arrest, although it is not as immediate a remedy in that an affidavit must first be filed that the spouse has been served with the original order and is now in breach; as soon as that is done, and without a hearing, the spouse in breach can be arrested.

[274] Roskill and Ormrod L.J.

[275] [1978] 1 All E.R. 729.

agreed, stated quite clearly:[276]

> Section 1 has already been subject to construction in two judgments of this court, and I say no more about it except that it contemplates quite separate proceedings and the county court rules indicate that the nature of the proceedings is by way of originating summons, so that those proceedings are separate and independent, if started in that form, from any other divorce or other proceedings which may be going on.
>
> Section 2, in my judgment, is completely general; it applies to any case where a judge, be he a High Court judge or a county court judge, grants an injunction in one or other, or more, of the three forms set out in s.2(1)-
>
>> '(a) restraining the other party of the marriage from using violence against the applicant, or (b) restraining the other party from using violence against a child living with the applicant, or (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included...'
>
> In my judgment the learned judge was wrong in the conclusion to which he came on the point of law that it was not possible in proper cases to attach a power of arrest to an injunction granted in the course of divorce proceedings, as in this case.

This decision must mean that a power of arrest can now be attached to matrimonial injunctions in the section 2(1) form in any proceedings whether they are pursuant to sections 1 and 4 of the 1976 Act or section 1(2) of the 1967 Act or whether the injunction is sought ancillary to a matrimonial cause or even after final decree.[277]

This general power of the High Court and county court has the advantage of being a considerably more expeditious remedy than the traditional application for a spouse in breach of an injunction to be committed to prison. There are of course conditions and Ormrod L.J.

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[276] Id. at 730, 731.

[277] Section 2(2) applies to cohabitees as well as to husbands and wives.

made it plain in *Lewis* that a power of arrest attached to an injunction "is not to be regarded as a routine remedy by any means." By section 2(1) the judge must be satisifed that the other party has caused actual bodily harm to the applicant or to a child and that a recurrence is likely. Furthermore a copy of the injunction with a power of arrest attached must be delivered to the officer in charge of the police station for the applicant's address.[278] It is interesting to note, however, that the Rules of the Supreme Court[279] and the County Court Rules[280] allow the judge to punish a person arrested for disobedience to an injunction even though a copy of the injunction had not been served on that person. One commentator has stated that the maximum time of danger is immediately after service of the injunction on the violent spouse.[281] Provided the police are given a copy of the court order straight away, then they can arrest without warrant should the spouse attempt to take revenge. Thus "with good police co-operation this should cut out delay at the danger point."

If a spouse is arrested he or she must be brought before a judge within twenty-four hours. Eekelaar has pointed out that this could be a problem:[282]

> This requirement to bring the arrested man before a judge within 24 hours could be an undue impediment to the

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[278] *See* S.I. 1977 No. 532 (L14) and S.I. 1977 No. 615 (L18); for the forms for the power of arrest and the order and warrant of attachment, *see* C.C.R. Ord. 46, r. 28(3), (7), S.I. 1977 No. 615 (L18).

[279] R.S.C. Ord. 90, r. 17(4) (S.I. 1977 No. 532 with effect from 1 June, 1977).

[280] C.C.R. Ord. 46, 5. 28(6) (S.I. 1977 No. 615 with effect from 1 June, 1977).

[281] M. Hayes, 8 *Family Law* 43 n. 37.

[282] *Supra* n. 118 at 81.

> proper working of the Act. Although the Lord Chancellor's Office considered that the occasions when it would be impossible to comply with this would be rare,[283] they did not seem to realise that women are frequently threatened on Saturday nights. Judges are unlikely to be readily available during the following day. Since the arrested person must be released if no judge is found, this consideration may well deter necessary protective arrests.

With respect, this seems doubtful. The fact that a judge may not be available on a Sunday[284] is not reason for failing to arrest a spouse who is in breach of an order on a Saturday night. Indeed, it must be hoped that 24 hours spent in a cell will have a salutary effect on the detainee, discouraging him from future attempts to violate the injunction.

The following is an example of the form which an application under the 1976 Act might take:

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[283] First Report of the Select Committee on Violence in the Family, Appendix 58.

[284] Eekelaar's objection may be met by s. 18 of the Domestic Proceedings and Magistrates' Courts Act 1978 once it comes into force. Section 18(3) provides that where a power of arrest has been attached to an order excluding a spouse from the matrimonial home and that the spouse has been arrest, he shall be brought before a magistrate within 24 hours. However no account is to be taken of a Sunday when computing the 24 hour period. It may turn out that spouses will seek exclusion orders with a power of arrest from the magistrates' courts in preference to orders under the 1976 Act if Eekelaar's criticism of that Act proves to be well founded. There is no doubt at all that under the 1978 Act if a spouse is arrested on a Saturday night, he can be kept in the cells until Monday.

In The Middlesex County Court

Plaint No.7934567

In The Matter Of The Domestic
Violence and Matrimonial
Proceedings Act 1976

And In The Matter Of The Occupation
of 100, Chapman Crescent, Harrow, HA3

BETWEEN:

Paula Foley	Applicant
-and-	
Alan Foley	Respondent

ORIGINATING APPLICATION

I, Paula Foley of 100 Chapman Crescent, Harrow, HA3 apply to the Court for an order in the following terms:

(1) That the Respondent shall be restrained by himself, his servants or agents from assaulting, molesting or otherwise interfering with me or our two children or communicating with me other than through a solicitor.

(2) That the Respondent shall vacate forthwith or at such time as the Court may order the joint home 100, Chapman Crescent, Harrow, HA3 and shall be restrained from re-entering and/or remaining in the said property and from approaching within 500 yards thereof.

(3) That a power of arrest may be attached to the Order of the Court.

(4) That the Respondent be ordered to pay the costs of this Application.

The grounds on which I claim to be entitled to the order are:

1. That the Respondent has violently attacked me and injured me and the two children.

2. That by his behaviour the Respondent has forced me to leave the joint home with the children for our safety, full particulars are set out in my affidavit sworn herein on the day of 1979 and served herewith.

The name and address upon whom it is intended to serve this application is Alan Foley 100, Chapman Crescent, Harrow, HA3.

My address for service in c/o

Dated

To the Registrar and to the
Respondent

It is usual to attach a draft order and of course the affidavit of the applicant setting out in detail instances of violence. This then is an example of the type of application which is coming before the courts and a few comments on when to apply for a section 2 order seem appropriate here. In Ansah v. Ansah[285] Ormrod L.J. said in relation to committal orders for breach of injunctions ancillary to divorce proceedings that committal orders are "remedies of last resort." He states:[286]

> in family cases they should be the very last resort. They are likely to damage complainant spouses almost as much as offending spouses, for example by alienating the children. Such orders should be made very reluctantly and only when every other effort to bring the situation under control has failed or is almost certain to fail. In most cases, stern warnings, combined with investigation and an attempt to alleviate the offending spouse's underlying grievances, or an adjournment to allow tempers to cool, will resolve the problem.... The new power created by the Domestic Violence and Matrimonial Proceedings Act 1976, s.2, to attach a 'power of arrest' to an injunction, may, when this Act comes into force, provide another useful alternative way of dealing with some of these cases.

Ormrod L.J. proceeds to discuss the danger of granting suspended committal orders where control passes out of the judge's hands altogether once such an order has been made. With respect, the section 2 power does not even require so much as an affidavit to put its teeth into operation and so judges have no control to prevent an arrest being made. There is no doubt, therefore, that judges should bear in mind Ormrod's comments about alienating children when they come to use section 2.

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[285] [1977] 2 All E.R. 638.

[286] Id. at 643.

A further point is that applications should rarely be made ex parte.[287] It is an extremely serious thing to exclude a spouse from the matrimonial home and hearings should be inter partes; this is doubly so when the applicants seeks, in addition, a power of arrest to be attached. As Ormrod L.J. said in *Ansah*:[288]

> ...the court should only act ex parte in an emergency when the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court. Such cases should be extremely rare, since any urgent application can be heard inter partes on two day's notice to the other side.... Circumstances, of course, may arise when prior notice cannot be given to the other side; for example, where...the wife is so frightened of the other spouse that some protection must be provided against a violent response to services of proceedings, but the court must be fully satisfied that such protection is necessary.

And just as judges do not like ex parte applictions it also seems that they are suspicious of the section 2 'power of arrest'. The indications are that counsel for the applicant will have to work hard to justify a section 2 order. This appears from the dicta or Ormrod L.J. in *Lewis (A.H.)* v. *Lewis (R.W.F.)*[289]

> If courts are going to attach powers of arrest automatically to injunctions, a very awkward and difficult situation is bound to arise. It is a very useful remedy in exceptional cases, where men or women persistently disobey injunctions and make nuisances of themselves to the other party and to others concerned. In my judgment a power of arrest is not to be regarded as a routine addition to an order or injunction.

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[287] *See* *Ansah* v. *Ansah*, *supra* n. 285 and *Practice Note* [1978] 2 All E.R. 919.

[288] [1977] 2 All E.R. at 642.

[289] [1978] 1 All E.R. at 731.

Conclusion

Today spouses and their children who require protection from violent partners are "faced with a battery of opportunities."[290] The choice marks a huge departure from the paucity of remedies which existed before 1977. Available soon will be exclusion orders from the magistrates' courts. Available now are exclusion orders under the 1967 and 1976 Acts from the county courts and High Court. Still extant are exclusion orders pending suit and after final decree. The total picture will be completed below with an examination of property adjustment orders under the Matrimonial Causes Act 1973, the ultimate sanction when it comes to terminating the occupation of the matrimonial home, and finally with a look at the special situation of matrimonial tenancies.

(d) transfer of property orders under the Matrimonial Causes Act 1973, s.24

This is an effective method of terminating a spouse's occupation of the matrimonial home. It will not be sought by a spouse in immediate physical danger: the 1967 and 1976 legislation will provide a swifter remedy for that individual. Often the 1976 legislation will be used as a first step. But where the spouse has petitioned for divorce, a property adjustment order can be sought to govern the long-term occupation of the matrimonial home, even if the home is the only asset of the marriage.[291] The courts have made it quite plain that on breakdown of marriage the matrimonial home is not always to be sold and that under section 24 it is possible to preserve the home for one or other of the parties. Section 24 is as follows:

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[290] David Bradley, (1977) 40 M.L.R. 452.

[291] For the situation when the matrimonial home is a tenancy, see heading D(5) below.

> 24.-(1) On granting a decree of divorce...or at any time thereafter...the court may make any one or more of the following orders, that is to say-
>
> > (a) an order that a party to the marriage shall transfer to the other party...such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
> >
> > (b) an order for the settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage...;
> >
> > (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

When deciding to transfer the matrimonial home from one spouse to another the court is required to take into account those circumstances enumerated in section 25[292] such as-

(a) the income, earning capacity, property and other financial *resources* which each of the parties to the marriage has or is likely to have in the foreseeable future;[293]

(b) the financial *needs*, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future;[294]

(c) the standard of living enjoyed by the family before the breakdown of the marriage;[295]

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[292] See Hanlon v. Hanlon [1978] 2 All E.R. at 894d-f per Ormrod L.J.

[293] See e.g. Rodewald v. Rodewald [1977] 2 All E.R. 609.

[294] See H. v. H. [1975] Fam. 9, cf. W. v. W. [1976] Fam. 107.

[295] See Barnes v. Barnes [1972] 3 All E.R. 872, cf. Shallow v. Shallow [1978] 2 All E.R. 483.

(d) the age of each party to the marriage and the duration of the marriage;[296]

(e) any physical or mental disablity of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including contribution made by looking after the home or caring for the family;[297]

(g) the value to either of the parties to the marriage of any benefit (such as pensions or insurance) which the party will lose owing to the dissolution...of the marriage;[298]

Section 25 closes with a direction to the court to place the parties to the marriage so far as is practicable and, having regard to their conduct, just to do so, in the financial position they would have been in had the marriage not broken down. Of course, had the marriage not broken down the parties would still be living in the matrimonial home and the courts have recognised this by preserving the home for the family. As for "conduct" the case of Wachtel v. Wachtel[299] mades it quite plain that only conduct which is "obvious and gross" will affect a section 24 order. And where a transfer of the matrimonial home is being considered the result usually depends upon the needs of the spouses and especially of their children.[300]

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296. See Cumbers v. Cumbers [1975] 1 All E.R. 1, cf. Campbell v. Campbell [1976] Fam. 347.

297. See Wachtel v. Wachtel [1973] Fam. 72.

298. See Trippas v. Trippas [1973] Fam. 134.

299. [1973] Fam. 72.

300. See Browne v. Prithcard [1975] 3 All E.R. 721, Martin v. Martin [1977] 3 All E.R. 762, Hanlon v. Hanlon [1978] 2 All E.R. 889.

Section 24 and 25 have given rise to much litigation. The current trend has been to preserve the matrimonial home rather than to order a sale so as to raise a lump sum for distribution. In several cases the husband has been ordered to transfer the house or his interest in it to his wife on condition that the husband is to receive a cash payment (usually a percentage of the equity of redemption) upon the youngest child reaching a certain age.[301] Sometimes the transfer is made on condition that the husband's periodical payments are to be reduced, often to a nominal sum.[302] This last type of order has the result of depriving the spouse of all interest in the matrimonial home and is probably the reason that the courts have favoured the Mesher order, taken from the case of that name.[303] Such orders stipulate that the matrimonial home is to be held in equal shares on trust for sale; the spouse in possession usually discharges all outgoings on the house and the trust is realised upon the youngest child of the household reaching a certain age, usually that of 16 or 17.[304] The advantage of such an order is that after a certain number of years both parties to the dissolved marriage will

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301. See Hector v. Hector [1973] 3 All E.R. 1070, McDonnell v. McDonnell The Times, 17 February, 1976.

302. See S. v. S. [1976] Fam. 18 (transfer of husband's share to the wife) see also Jones v. Jones [1976] Fam. 8, Hanlon v. Hanlon [1978] 2 All E.R. 889 (transfer of home solely owned by husband to wife; husband's periodical payments to the children reduced).

303. Mesher v. Mesher, The Times, 13 February, 1973.

304. See also Browne v. Pritchard [1975] 3 All E.R. 721 (sale postponed until youngest child reached age of 18 1/2) cf. Chamberlain v. Chamberlain [1974] 1 All E.R. 33, Trippas v. Trippas [1973] 2 All E.R. 1, Bryant v. Bryant (1976) The Times, 3 February, 1976 (the husband was stripped of his interest in the matrimonial home because the court found that he was unlikely obey an order to maintain his former wife and children.

receive a sum of money which they can invest; the drawback is that the sum of money will often be inadequate to provide the spouse who was formerly in possession with another home.

A new development happily occurred in judicial reasoning and there has been a move away from the Mesher order. In Martin v. Martin[305] the marriage broke down after 15 years. The husband had alternative accommodation and the wife was living in the jointly owned matrimonial home. As the wife's share in the matrimonial home was insufficient to enable her to buy another home the judge at first instance ordered that the wife should remain in occupation for life or until remarriage or voluntary removal. The husband's appeal against the order was dismissed. Ormrod L.J. made some pertinent observations:[306]

> I appreciate the point (counsel for the husband) has made, namely it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973. It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore it is a matter of trial and error and imagination on the part of those advising clients. It equally means that the decisions of this court can never be better than guidelines. There are no precedents in the strict sense of the word.

Having established a footing on which to challenge the sanctity of the Mesher order, Ormrod L.J. goes on to say:[307]

> This case was rightly approached by Purchas J. He adopted the Browne v. Pritchard approach. It is clearly a case where needs far outweigh resource in importance. It is a case where both parties need a secure home at a price which each can afford, and that they have under Purchas J.'s order. It seems to me that it is exactly right...

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[305] [1977] 3 All E.R. 762.

[306] Id. at 768.

[307] Id. at 769.

> The only other matter on which I want to comment is this. Counsel for the wife in his submissions to the judge below commented on the fact that a practice seems to be developing of postponing the sale of the matrimonial home in similar cases to this until after the youngest child has reached the age of 18 or whatever the appropriate age may be and no further. Counsel for the wife made the point that that practice is in danger of ousting the general discretion of the court under s.25 of the 1973 Act. I think there is a good deal of force in that. As Stamp L.J. pointed out in argument, that form of order originated in this court in a case called Mesher v. Mesher, where it was no doubt aptly suited to the circumstances prevailing in that case. But it was never intended to be a general practice. There is no magic in the fact that children have to be considered. All it means is that the interests of the children take priority in these cases, so that often there can be no question of sale while the children are young. But the situation that will arise when the children reach the age of 18 requires to be carefully considered. Otherwise a great deal of hardship may be stored up in these cases by treating it as a rule of thumb that the matrimonial home should then be sold. It is not a rule of thumb.

The goal seems to be one of weighing each individual case on its merits, 'of weighing up each side's resources and trying to ensure that neither party is rendered homeless'. Thus in a short space of time the direction of this area of the law has shifted and the Court of Appeal has made it clear that in the proper case it will endorse applications for adjustment of property orders that are permanent as opposed to temporary as in Mesher. The courts below are certain to follow the Court of Appeal's lead. It is now possible for a wife with no legal interest in the home to have it transferred to her absolutely. These orders will issue whenever the needs of the parties outweigh their resources and there seems to be scope for their application to situations outside of abject need. There is no doubt that the courts can prevent much hardship and disruption to the spouse in possesion by ordering an out and out transfer of the matrimonial home to that spouse and it is to be hoped that the Martin order will issue frequently in the future. It did in Hanlon v.

Hanlon[308] yet another example of where needs outweighed resources. Ormrod L.J. gave the first judgment in that case. He observed that the matter in Hanlon came before the registrar in 1976 when Mesher v. Mesher was regarded as the 'bible'. The marriage in Hanlon broke up after 14 years. The husband lived rent free in a police flat and the wife remained in the matrimonial home (bought in the sole name of the husband) with her four children. The registrar ordered that the wife should buy the husband's share in the house but it turned out that she was unable to raise the financing. The wife was eventually given leave to appeal against the registrar's order and the matter went back to Rees J. and back again to the Court of Appeal. In "despair" Rees J. had made the "normal order". As Ormrod L.J. said:[309]

> By 'the normal order' he meant a Mesher v. Mesher type of order, that is to say, the sale of the house to be postponed until the youngest child reached the age of 17 and the proceeds of sale divided equally.... So the judge, in despair, made the Mesher v. Mesher type of order.

The learned Lord Justice proceeded to expose the disastrous consequences of the order in Hanlon. By postponing the sale of the home for 5 years the parties would receive a total of £10,000 and of that sum £5,000 would go to the Law Society for the costs incurred in the case, the parties being legally aided. Ormrod L.J. stated:[310]

> So the effect of the order will be, in the short term, to make the wife and such of the children who are still with her, homeless in 5 years' time, that is in 1982, while the husband, assuming that he is still in the police force, will have a perfectly safe house or flat, until he chooses to leave the force or has to leave the force. That is a situation which one cannot contemplate as being

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[308] [1978] 2 All E.R. 889.

[309] Id. at 892.

[310] Id. at 893.

> satisfactory in any sense of the word at all, and so we have to look at the matter again.

Ormrod considered the fact that upon retirement the husband would get a considerably larger lump sum than the wife, who was also working, and so would be considerably better off than the wife. The judge then looked at the history of the marriage and concluded that the wife had made 'a very large contribution' to the family. In taking into account these section 25 considerations, Ormrod emphasized that 'equality' is not to be found in that section.[311] Earlier in his judgment he had said:[312]

> Up to now everybody has been approaching the case on the footing that the interests of these two parties in this property were equal. That seems to me to be a doubtfully accurate assumption, or premise.

The implication from the judgment is that the wife had earned more than a 50% share in the house. But it seems that the Court of Appeal were moved to order a transfer of ownership of the property by other considerations:[313]

> A family like this will not simply dissolve completely on the 17th birthday of the youngest child. In fact, of course, she will be, as the mother of this family, maintaining the nucleus of the home effectively for a considerable number of years until the girls are married and settled on their own, and the boys are similarly married and settled on their own; that is what it really means in real life.

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[311] Cf. The Matrimonial Property Act 1978, S.A. c.20, sections 7(4) and 36(2).

[312] [1978] 2 All E.R. at 893.

[313] Id. at 893, 894.

Ormrod L.J. concluded:[314]

> In my judgment it would be a quite wrong exercise of the discretion in accordance with the principles of s.25 to make any order which had the result of forcing her to leave that property in the foreseeable future. It was suggested that this might be the kind of case which could be met by postponing the sale indefinitely until further order, and then distributing the proceeds of sale, not necessarily on a 50-50 basis; but I do not think that that, in this case, would be in the least satisfactory; it would leave the wife in a state of perpetual uncertainty and neither party would know where ultimately they were going to be. It seems to me far better that the parties' interests should be crystallised now, once and for all, so that the wife can know what she is going to do about the property and the husband can make up his mind about what he is going to do about rehousing.

Stamp and Orr L.J. agreed and the court ordered the husband to transfer the house to his wife absolutely; the periodical payments which he was making for the children were reduced to a nominal sum.[315]

Today the courts will be beseiged with arguments for and against the Mesher and the Martin/Hanlon orders. Both orders effectively crystallise the beneficial and legal interests of the parties and both terminate one spouse's occupation of the matrimonial home. But the great advantage of the Martin/Hanlon order is that the home need never be sold at all. The order settled the occupation of the matrimonial home once and for all, giving the spouse in possession the sole legal right to occupy to the exclusion of the other spouse.

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[314] Id. at 895.

[315] This is in line with the solution suggested in Wachtel v. Wachtel [1973] Fam. 72 at 96 per Lord Denning M.R. who gave the judgment of the court in that case.

(5) The power of the spouse to terminate the other spouse's occupation of the matrimonial home where the matrimonial home is a tenancy

Up until now, this thesis has been concerned with the situation where the matrimonial home has been owned by one or other of the spouses or by both of them. But as in several of the cases cited above, the matrimonial home is often rented accommodation. In England alone, there are over 5 million council tenancies, the majority of which are matrimonial homes.[316] Throughout this thesis we have seen the needs of family law encroach upon the strict principles of property law: this area is no exception to that trend, although the progress which family law has made in this area, as in Section C above, has been slow and there is a considerable way to go.[317] The problems which spouses can face are as many as there are different types of tenancies. It is not hard to see why there can be difficulty. When a spouse seeks to exclude his or her partner from the matrimonial home by court order[318] or where that spouse seeks a transfer of that tenancy under the Matrimonial Homes Act 1967[319] or under the Matrimonial Causes Act 1973[320] third parties such as private landlords and Local Authorities will be affected and very often covenants contained in the leases can create serious problems. In fact, this is an area of double jeopardy for the deserted wife for not only must the wife worry about her husband's schemes but she must also keep an eye on the landlord, who, in many instances, might be delighted to obtain an order for possession against the spouses.

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[316] See M.D.A. Freeman & C.M. Lyon, "When the Matrimonial Home is a Council House", (1978) 8 Family Law 187; Todd & Jones, supra n. 47 at 9, found in their study that 45% of all married couples rented their homes and 62% of that total had tenancies with the local authorities.

[317] See e.g. O. Stone, supra n. 2 at 97, 189; see also Law Commission, Published Working Paper No. 42, Family Property Law (1972) 45 - 49; Law Commission No. 86, supra n. 79.

[318] Under the Matrimonial Homes Act 1967, s. 1 and the Domestic Violence and Matrimonial Proceedings Act 1976, ss. 1, 4.

[319] Section 7.

[320] Section 24.

I propose to give a review of the general remedies available to spouses according to how the lease is held and irrespective of whether the tenancy is inside or outside the protection of the Rents Act. After that overview I will consider some of the special provisions which attach to the tenancies depending on their type. For the purposes of this section I will assume that it is the wife, unless otherwise stated, who is seeking to exclude her husband or who is seeking a transfer of the tenancy. Of course, the powers of the husband in such situations are the same as those of the wife. The landlord's power to terminate the spouse's occupation is based naturally on very different grounds but as the effect is the same, that power is also subject to regulation and restrictions, and worthy of special attention.

(a) where the spouses hold the lease as joint tenants[321]

Section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 allows one spouse to apply to the court for an order "prohibiting, suspending or restricting" the other spouse's right to occupy the matrimonial home. Section 4(3) envisages cases where the matrimonial home would be rented; it provides-

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[321] In Todd & Jones, supra n. 47 at 9, 14% of the tenancies were in joint names.

> (3) Where each of two spouses is entitled to occupy a dwelling house by virtue of a contract, or by virtue of any enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.

The reference to "any enactment" in the subsection brings tenancies within the Rent Act 1977 and the Rent (Agriculture) Act 1976 under the ambit of this provision. As we have seen above[322] the guidelines contained in section 1 of the Matrimonial Homes Act 1967 will be followed by the courts whenever one spouse seeks to exclude the other from the tenancy.

Section 1 of the 1976 Act could also be used by a spouse as there is no precondition that the lease must be held in a particular way. The principles discussed in Section D(4)(c) would apply.

Of course, excluding a spouse is not the end of the matter. Rent must be paid and covenants obeyed. Very often the court order will place the obligation to pay the rent on one spouse so that there can be no doubt.

A less obvious way of excluding a spouse from the matrimonial home is for the husband to desert his wife and to immediately or eventually stop paying rent. If the wife is unable to come up with money for the rent and possibly for the arrears, then it could be said that the husband has effectively terminated his wife's occupation of the tenancy by leaving her open to an action for possession. But, provided the wife, as joint-tenant, pays the rent and observes the covenants in the lease, she will be secure in the home. As a joint-tenant she has a contractual right to be in occupation until the proper notice to vacate is given by the landlord. And if the property is within the Rent Act 1977 only the proof of statutory grounds will enable the landlord to obtain possession.

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[322] Section D.(4)(c).

It is worth noting here that both spouses, as joint tenants, could use section 24 of the Matrimonial Causes Act 1973 or section 7 of the Matrimonial Homes Act 1967 provided the tenancy was within the Rent Acts, to obtain a transfer of the tenancy into sole name of the applicant spouse. The transfer of tenancies will be discussed below.

(b) where the husband holds the lease in his name alone and the wife is therefore a non-tenant[323]

Should the wife wish to exclude the husband from the home, she could proceed via section 1 of the Matrimonial Homes Act 1967, whether the matrimonial home was within or outside of the Rent Act or by section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976. The wife could also petition for divorce and seek a transfer of the tenancy under section 24 of the Matrimonial Causes Act or possibly under section 7 of the Matrimonial Homes Act: as we shall see, the success of such application depends upon the type of tenancy which the matrimonial home is and whether there are covenants against assignment.

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[323] In Todd & Jones, supra n. 47 at 9, 82% of the tenancies were in the husband's name and only 3% were in the wife's name.

The husband on the other hand could use section 1 of the 1967 Act to terminate his wife's rights of occupation. It will be noted that the only material difference between holding the lease in joint names as opposed to being the sole tenant, is that the former spouses have a right to occupy and so must resort to the 1976 legislation, whether it be section 1 or 4 to exclude their partner from the home. Where, as here, rights of occupation are involved, the husband must use section 1 of the 1967 Act. Section 1 of the 1976 Act is also a possibility.

Where a husband deserts his wife and stops paying the rent this could effectively terminate his wife's rights of occupation. But by section 1(5) of the Matrimonial Homes Act if the accommodation is a Rent Act tenancy then the wife's occupation is regarded as the husband's occupation and by the same section, and regardless of the type of tenancy, payment of rent by the wife is treated as being made by the husband. This section gives the wife considerable protection if the accommodation is a Rent Act tenancy; but as we shall see below her position is weak if the tenancy is not protected by Rent Act legislation and it remains a distinct possibility that a husband could terminate his wife's rights of occupation by simply scheming with the landlord.

(c) tenancies protected by the Rent Act 1977

As we have seen above in section C(2)(e),[324] payment of rent by one spouse is as good as payment by the other and the same holds true with regard to occupation or possession if the tenancy is within the Rent

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[324] At page 31 above.

Acts.[325] It is necessary, therefore, to know when a tenancy is covered by the Rent Acts.[326] Clearly the legislation was designed to protect tenants who were poor from high rent and eviction with no notice and for no reason. The Rent Act 1977 today protects more than just the poor but there are a large number of exceptions outside the scope of the Act. Tenancies not protected include houses above a certain rateable value,[327] tenancies at a low rent,[328] lettings to students,[329] local authority tenancies,[330] as well as other types of tenancies.[331] What remains, however, is a large number of tenancies protected by the Rent Acts. The scheme of the legislation reflects the piece-meal reform approach which successive governments have taken in this area of the law. Before 1965 there was what was known as "controlled" tenancies. In 1965 "regulated" tenancies were created. Both types were based on varying rateable values of the property and each had slightly different restrictions regarding rent and eviction. Under the Rent Act 1977, whether the tenancy is "controlled" or "regulated", provided the spouse has a contractual lease, he has what is called a "protected" tenancy. Once the contractual lease comes to an end, then if the tenant is given a notice to quit the protected tenancy becomes a "statutory" tenancy which is

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325. Matrimonial Homes Act 1967, s. 1(5).

326. For a brief outline, see Bromley, supra n. 18 at 487 ff; see also R.E. Megarry, The Rent Acts, (10th ed.) 72ff.

327. Rent Act 1977, s. 4.

328. Id. s. 5.

329. Id. s. 8.

330. Id. s. 14.

331. See id. ss. 7, 9-13, 15, 16.

capable of giving long term rights of possession to the tenant and his spouse. This nomenclature is vital to deserted spouses who are non-tenants for by virtue of section 1(5) of the Matrimonial Homes Act if the husband is a protected or statutory tenant and the wife is in actual occupation, then this is considered to be occupation by the husband. There are problems, however, when the husband is no longer entitled to occupy the matrimonial home by virtue of the Rent Act; this can happen, for instance, where the landlord obtains an order for possession against the tenant. In Penn v. Dunn[332] it was held that in such circumstances the non-tenant spouse loses her rights of occupation under the 1967 Act and her occupation becomes a trespass. Short of the landlord obtaining an order for possession, the combination of the Rent Act 1977 and the Matrimonial Homes Act has significant implications. The husband cannot conspire, for instance, with the landlord to bring the tenancy to an end by acknowledging the landlord's right to the premises.[333] Eviction must be based on the statutory grounds contained in the Rent Act. Provided the wife observes the covenants in the lease and makes sure that the rent is paid, her occupation will be secure. Should the landlord attempt to oust the wife by giving notice to quit, then the result will be to convert a protected tenancy into a statutory one. As Bromley has written:[334]

> Thus it will be seen that the deserted wife of, say, a weekly tenant under a controlled or regulated tenancy has greater

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[332] [1970] 2 Q.B. 686.

[333] See e.g. Middleton v. Baldock [1950] 1 K.B. 657.

[334] Supra n. 18 at 494, 495.

> security than the deserted wife of a husband who holds the matrimonial home in fee simple or for a long term of years, for she can in effect claim the protection of a statutory tenant.

(d) tenancies not protected by the Rent Acts

The most significant type of tenancy outside the Rent Act 1977 is the Council tenancy. There is, in addition, a considerable number of tenancies not within the Act because the rateable value of the property is above a certain figure.[335] It is this type of tenancy and the Council tenancy which have given wives much more difficulty than their Rent Act counterparts. We are not concerned here with the general remedies such as the Matrimonial Homes Act or Domestic Violence Act injunctions but rather with special problems which attach to a tenancy because of its nature.

Leaving aside Council tenancies and Rent Act tenancies, there is a group of tenancies which are susceptible to the scheme which failed in Middleton v. Baldock.[336] It is fair to say, therefore, that this scheme presents a husband with an additional means for terminating his wife's occupation of the matrimonial home. In Baldock the husband was entitled to the protection of the Rent Restriction Acts as a statutory tenant. Subsequently he deserted his wife and the landlord brought an action for possession against the husband and the wife. The landlord did not establish grounds under the Rent Acts for possession but instead relied upon an "admission" filed by the husband:

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[335] See Rent Act 1977, s. 4.

[336] [1950] 1 K.B. 657; see also Brown v. Draper [1944] K.B. 309 at 314; Old Gate Estates Ltd. v. Alexander [1950] 1 K.B. 311.

> I admit the landlord's title and her right to immediate possession and offer to give possession forthwith.

The County Court judge gave an order for possession but this was reversed by the Court of Appeal who held that the landlord had to establish grounds under the Rent Acts and not just an admission in order to obtain possession. Furthermore the Court of Appeal held that the wife's occupation was as good as the husband's. But if the Rent Acts had not applied, then the wife may not have succeeded in remaining in possession. As Lord Greene M.R. stated in Brown v. Draper:[337]

> The tenant of the house held for a fixed term goes abroad on military service, leaving his wife in the house. While he is abroad his lease comes to an end. At common law the wife becomes a trespasser and the landlord can take proceedings to recover possession from her.

Thus when a lease expires the wife can be in difficulty and the situation can be no different where the lease comes to an end through surrender by the husband outside of a situation where the Rent Acts apply. So, if the husband during the lease uses a Middleton v. Baldock admission and the tenancy is outside the Rent Acts, it is possible that the wife may effectively be forced to leave owing to her husband's actions. There are ways of preventing this possibility from arising; for instance the wife could obtain a Lee v. Lee order restraining the husband from dealing with the tenancy in such a way so as to prejudice the wife's rights of occupation. But more often than not the wife will find out about the scheme too late. Of course, the Lee v. Lee order is directed against the husband however there is some dicta which suggests that, regardless of what the husband does, the courts may be slow to assist landlords who seek to recover possession of their property from deserted wives. The author of this dicta is not surprisingly Denning L.J. In Middleton v. Baldock[338] and in Old Gate Estates Ltd. v. Alexander[339] Denning gave succinct judgments: his dicta in both cases can be restricted to their Rent Act context but I have no doubt that in Middleton v. Baldock Denning L.J. intended to adumbrate a wide proposition of general application. One could see it coming from a perusal of counsel's submissions in that case. Sabin, who was counsel for the landlord, never did convince the court that his argument was sound:[340]

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[337] [1944] K.B. 309 at 314.

Sabin:	The wife could only be protected in her occupation of the house through her husband, and the husband had filed an admission of the landlord's title which was enough to enable the judge to make the order (for possession).... The only protection under the Rent Restriction Acts is for the person in occupation. If the wife had that protection, the husband had none...
Evershed, M.R.	The essence of this case is that the wife is rightly in possession. While that was so the husband's admission was valueless.
Sabin:	The main question is whether the wife is in a special position now that she has become a feme sole under the Married Women's Property Act 1882.
Evershed M.R.	Is it any the less the obligation of the husband to provide his wife with a residence? The wife here is in occupation of the matrimonial home.
Sabin:	If the tenant had allowed someone other than his wife to remain in possession, that would not have availed against the landlord. The wife's occupation is not of a different nature.

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[338] [1950] 1 K.B. 657.

[339] [1950] 1 K.B. 311.

[340] [1950] 1 K.B. 657 at 660.

Denning L.J. The wife is lawfully there. In a case between an innocent wife and a deserting husband no court could give the husband relief.

Sabin: The position is different since the wife became a feme sole: Rees v. Hughes.[341]

Evershed M.R. That case is concerned with property.

Sabin: Here interests affecting property are involved.

It must be remembered that this case did concern a wife's possession under The Rent Acts. Today, owing to section 1(5) of the Matrimonial Homes Act, there can be no doubt that the wife's occupation is as good as the husband's under the Rent Acts. But this is not the case if the tenancy is not protected by the Rent Acts. That being the case, I think there is some force in Sabin's argument that the wife's occupation is not of a different nature vis-a-vis the landlord. Denning L.J. ignored the thrust of Sabin's submission completely and talked in terms of no court giving the husband relief. However, as Sabin pointed out, it is the wife who must prevail against the landlord, who may or may not be an innocent third party. In Baldock the landlord's position was largely ignored, the Court of Appeal finding against her. The case is significant for its implications to tenancies outside of the Rent Acts. Denning L.J. said:[342]

> The tenant in this case, however never went out of occupation. He left his wife there, and he had no right to turn her out. Even if she stayed there against his will, he could not turn her out. Mr. Sabin says that the wife and husband are no longer one in law. That is true, but there is a special relationship between them which is recognised and regulated by the law; and one of the features of that relationship is that the husband cannot sue his wife for a tort.... *He cannot as of right turn her out of the matrimonial home, even if he is the owner or legal tenant of it.* All he can

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[341] [1946] K.B. 517.

[342] [1950] 1 K.B. 657 at 660. Italics mine.

> do is to make an application to a court under section 17 of the Married Women's Property Act 1882, and ask the court in its discretion to order his wife out: see Bramwell v. Bramwell[343] per Goddard L.J., and H. v. H.[344] In a case of the present kind, where the husband has deserted his wife and she has nowhere else to go, no court would order her out. She is therefore lawfully there, and, so long as she remains lawfully there, he remains in occupation by her. If he desires to cease to be in occupation - and to cease to be responsible for her occupation - then he must go to the court and persuade it, if he can, to order her out. But until that time arrives she is lawfully there, and she can claim in his right, even against his will, to be there. The landlord can only get possession if the rent is unpaid or some other condition of the Acts is satisfied entitling him to possession.

This passage has parts which could have come from Bendall v. McWhirter[345] a case discredited by the House of Lords in 1965. There is no doubt that this case still stands after Ainsworth and is correct in relation to the Rent Acts. But the learned Lord Justice seems to be implying that from the words which I have placed in italics that the husband cannot turn the wife out of a matrimonial home, whether it is owned by the husband or leased in his name, whether that lease is under the Rent Acts or not. The implication is that because of the special relationship between husband and wife the courts will be slow to give husbands and landlords relief. That course may be right in relation to spouses seeking to exclude each other but after Ainsworth it seems very doubtful in relation to third parties. It is not hard to confine the dicta in Baldock to the facts of that case and I think it fair to conclude that where a husband surrenders his lease, as in Baldock, and that lease is not within the Rent Act, then the wife by that means can effectively be excluded from the matrimonial home.

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[343] [1942] 1 K.B. 370 at 374.

[344] 63 T.L.R. 645.

[345] [1952] 2 Q.B. 466 and see section A.(1)(iv) above.

(e) excluding a spouse from the matrimonial home by applying for a transfer of the tenancy

This method of excluding a spouse from the matrimonial home lends itself to separate treatment from devices such as the scheme in Middleton v. Baldock and from exclusion orders such as those under the 1967 and 1976 legislation. On the one side are Rent Act tenancies which have a special statutory provision of their own. On the other side are tenancies outside the Rent Acts which are susceptible only to a transfer of property order under the Matrimonial Causes Act 1973.

(i) Rent Act tenancies and section 7 of the Matrimonial Homes Act 1967

The section as amended by the Rent Act 1977[346] provides:

> 7.-(1) Where one spouse is entitled, either in his or her own right or jointly with the other spouse, to occupy a dwelling house by virtue of-
>
> (a) a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977 or
>
> (b) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976,
>
> and the marriage is terminated by the grant of a decree of divorce or nullity of marriage, the court by which the decree is granted may make an order under subsection (2) or (3) below according to the circumstances.
>
> (2) Where a spouse is entitled as aforesaid to occupy the dwelling house by virtue of a protected tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from the date on which the decree is made absolute, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, his or her former spouse-

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[346] Section 155 and schedule 23.

> (a) the estate or interest which the spouse so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy..., with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject;...

Section 7(3) deals with orders affecting statutory tenancies. It can be seen from this section that the court is empowered to transfer a protected or statutory tenancy from one spouse to the other once the marriage has been terminated. By section 7(1) it matters not in whose name or names the lease is. It is interesting to note that the 1967 Act does not lay down any guidelines for the court to follow when ordering a transfer of a Rent Act tenancy and it is clear that section 7 is not as cumbersome a process as section 24 of the 1973 Act.

(ii) section 24 of the Matrimonial Causes Act and Council tenancies

As we have seen, section 7 of the 1967 Act is of no avail to tenancies outside the Rent Act 1977. Thus if a spouse seeks a transfer of these types of tenancy, he or she must turn to section 24 of the Matrimonial Causes Act 1973, the principles of which have been discussed above.[347] There is no doubt that long leases are "property" that is capable of being adjusted on the breakdown of marriage. However for a while it was thought[348] that Council tenancies were not property within the meaning of the Act. It is now established that Council tenancies are property which can be adjusted pursuant to section 24.[349]

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[347] See Section D.(4)(d) above.

[348] Brent v. Brent [1975] Fam. 1.

[349] See Thompson v. Thompson [1975] 2 All E.R. 208 at 211; Hale v. Hale [1975] 2 All E.R. 1090 at 1093.

By including Council tenancies as "property" within section 24, the courts solved one problem only to run into much more difficulty. In the first place there was the problem of what has been described as the "legal impediment"[350] to the adjustment of Council tenancies. By section 113(5) of the Housing Act 1957, the local authority is obliged to make it a term of every lease that the tenant shall not assign the premises without the written consent of the authority. As one commentator has said:[351]

> It is a logical rule of law that the court can only order the transference of a right or interest which the transferor in fact possesses. Thus if the potential transferor's tenancy includes a term preventing him from assigning his interest without the consent of the landlord, the court cannot order the transference of that tenancy. This rule applies equally to public and private tenancies and the reasons for its operation are obvious: if the court were to order the transference of a tenancy without first enquiring whether the landlord was likely to consent to the transfer, then the landlord could ex poste facto terminate the tenancy (which would be detrimental to the standing of the law itself.)

This dilemna is illustrated in Regan v. Regan[352] where there was a term equivalent to section 113(5) prohibiting assignment without written consent. The court held that it would not make an order under section 24 because it was likely that the council would not implement a property adjustment order. Baker P. stated that if there was a condition against assignment and the landlord was not prepared to consent, then that was the end of the matter.[353] As Freeman and Lyon have written,[354] it is well worth obtaining a statement from the authority to the effect that it has no objection to a transfer[355] before seeking a court order.[356]

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[350] Moira Wright, (1978) 8 Family Law 19.

[351] Id.

[352] [1977] 1 All E.R. 428; see also Rodewald v. Rodewald [1977] 2 All E.R. 609.

In addition to the legal impediment there are public policy considerations.[357] In Regan and in Rodewald the court emphasised that housing was a matter for the local authorities and that there was no point ordering a transfer which would not be implemented by the local authority. It is extraordinary that when it comes to taking away legal rights altogether as in Hanlon the courts will act and will justify their orders with statements such as "this is essentially a housing matter and the needs of the children come first." Yet when it comes to taking away minimal rights to occupy council tenancies, the courts seem to relegate the "needs of the family approach" to second place behind the all-embracing proposition that housing is a matter for the local authority. This judicial reluctance to interfere with local authority housing policy has been criticised:[358]

> The court claims justification in the necessity for visible non-interference and the avoidance of influence in the

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[353] [1977] 1 All E.R. 428 at 429.

[354] (1978) 8 Family Law 189.

[355] Hutchings v. Hutchings, cited in Regan v. Regan referred to above and reported at (1975) 237 E.G. 571.

[356] For suggestions as to how section 113(5) of the Housing Act can be circumvented, see Freeman & Lyon, 8 Family Law at 190.

[357] M. Wright, 8 Family Law 19; Freeman and Lyon, id. at 190.

[358] M. Wright, id. at 20.

> decision making process of a local authority. In doing this, however, the court inevitably runs the risk of failing to uphold the interest of the individual, and failing in its fundamental duty as guardian of individual rights. This must be the position in any case where the court declines to adjudicate on the merits of the applicability of the local authority policy to the particular case.

The critic goes on to say that even though the local authority can terminate a tenancy that it objects to on short notice, at least the court has expressed an opinion and has given the local authority some guidance. At the moment the courts are reluctant to interfere unless the order is in keeping with council policy.

The conclusions are not hard to draw. Using Todd and Jones' data[359] as a rough estimate, 45% of all matrimonial homes are rented and 62% of that figure represent local authority tenancies. The spouse in that accommodation, especially if she is the non-tenant, can use the relevant sections of the Matrimonial Homes Act and the Domestic Violence Act to exclude the other spouse and may also take advantage of section 1(5) of the 1967 Act with respect to paying rent. But when it comes to divorce and to an application under section 24 to terminate the other spouse's occupation once and for all, council tenant spouses are in a much worse position that their Rent Act and owner-occupier spouse counterparts.

A solution to these problems has been canvassed. The suggestion is to extend the application of secion 7 of the Matrimonial Homes Act to Council tenancies.[360] However it is worth noting that the most recent Law Commission study[361] has come out against recommending an extension of section 7. It would seem, therefore, that for the time being, council tenant spouses must content themselves with the Law Commission's conclusion that in general local authorities do allow divorced spouses to take over tenancies or at least to move into suitable alternative accommodation.

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[359] Supra n. 47 at 9.

[360] See Law Com. No. 86 supra n. 79 at para. 1.20; Finer Report, supra n. 85 at para. 6.85.

[361] Law Com. No. 86, paras. 2.64 - 2.73.

E. The ideal way to determine disputes today as to the occupation of the matrimonial home

(1) where the spouses wish to save the marriage

Before 1967 if a spouse was subjected to violence there was little alternative except to petition for divorce and apply ancillary to the matrimonial cause for an injunction excluding the violent spouse from the matrimonial home. The marriage had to be brought to an end for the courts to issue restraining orders and where, in urgent cases, a petition had not been commenced, the applicant spouse had to give an undertaking to start proceedings forthwith in order to obtain an injunction. The law was such that parties were often forced into divorce in order to obtain relief.

In 1967 the Matrimonial Homes Act had the potential to give relief without forcing spouses to file a petition for divorce but after Tarr v. Tarr[362] it was clear that even a violent spouse could not be excluded from the home if he was an owner of it. This decision rendered the Act ineffective to exclude owner spouses and so the only resort remained injunctions pending suit.

In 1976 the Matrimonial Homes Act was amended and new remedies were added. Now whether the matrimonial home is owned or rented by one or both spouses, either may apply for an exclusion order. No other proceedings need ever be instituted. One commentator expressed her delight at this situation in these terms:[363]

> (The 1976 Act will) take the pressure off spouses and their legal advisers to file a petition for divorce or judicial

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[362] [1973] A.C. 254.

[363] M. Hayes, 8 Family Law 6.

> separation without giving proper reflection to the question whether it is really necessary to terminate the marriage. Molestation, even where there has been a serious assault, does not always mean that the marriage has broken down irretrievably. Eviction from the home may of itself have a salutary effect on the behaviour of the violent spouse. Also it allows for a "cooling" off period in which both parties can decide whether there is anything worth preserving in their marriage.

It can be said, therefore, with certainty that if the marriage is still alive a spouse seeking to exclude his or her partner temporarily, would be advised to use either section 1(2) of the Matrimonial Homes Act or sections 1 or 4 of the Domestic Violence Act, depending upon the physical danger and the legal rights[364] involved. The exclusion order from the Magistrates Courts will soon be available and will provide yet another possibility for the spouse who does not wish to end the marriage.

(2) when the marriage has broken down irretrievably

The courts have said time and again that the spouse should not be seeking orders under the Law of Property Act or the Married Women's Property Act. The advice given is to petition for divorce and to apply at the same time for an adjustment of property order under the Matrimonial Causes Act. There is no better way to determine disputes about the occupation of the matrimonial home. For the spouse whose marriage is dead, applications for injunctions pending suit will still be sought to govern the short term occupation of the home; such applications seem to be thriving today.[365] In urgent situations the spouse may well use section 1 of the Domestic Violence Act and seek a section 2 power of arrest to be attached to the order.

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[364] Still a consideration when choosing section 1(2) of the Matrimonial Homes Act or sections 1 or 4 of the Domestic Violence and Matrimonial Proceedings Act.

[365] See the unreported cases section in Current Law (1978 - 1979); see also Dirir v. Dirir (1979) 9 Family Law 20; Elsworth v. Elsworth (1979) 9 Family Law 21.

Conclusion

Despite various inconsistencies in this area of the law it is clear that English spouses have a veritable battery of remedies which they can resort to when it comes to settling the long or short term occupation of the matrimonial home. In the last decade and a half, spouses, especially those who are deserted or battered, have obtained a measure of protection which has yet to be equalled in many other common law countries. In the next section we will be examining the occupation of the matrimonial home in one such country, namely Canada and its common law jurisdictions.

II. CANADA'S COMMON LAW PROVINCES

A. The right of the wife to occupy the matrimonial home vis-a-vis her husband

(1) the strict position at common law

In Canada all the older common law provinces, except Quebec, took the law of England as of their establishment and so inherited the common law. As we have seen in I.A.(1) above, marriage did not give a wife any rights in her husband's property and as Lord Wilberforce stated in Ainsworth[366] the common law did not recognise any right of the wife to remain in her husband's property against his will. As in England the strict position at common law has been eroded and in some provinces legislation has been enacted which has gone some way towards developing the concept of "a right of occupation" of the matrimonial home.

There is no doubt, however, that the legacy left by Bendall v. McWhirter[367] seems to have confused some commentators as to the strict position at common law. In 1977 one commentator wrote:[368]

> The common law position concerning the right to occupy the matrimonial home was that, where the legal and equitable title was in the husband, the wife could claim the right to occupation by virtue of her right to her husband's consortium and her right to be maintained by him; the husband discharged his obligations by providing the home. Thus if the wife were deserted, she was entitled to remain in the matrimonial home, unless she had forfeited her right to

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[366] [1965] A.C. 1175 at 1243.

[367] [1952] 2 Q.B. 466.

[368] M. McCaughan, Legal Studies of Married Women in Canada (1977) at 82.

> maintenance. Conversely, if the legal and equitable title were in the wife, her duty to cohabit gave the husband the right to occupy the matrimonial home. *The right of both spouses was irrevocable so long as the marriage subsisted.*[369]

As we have seen by an examination of the common law in England above the wife had no right to occupy the matrimonial home against the will of her husband. If she was deserted, the husband used to be able to eject her by the device of a fictitious lessee. And if he barred the door, the most she could do was pledge his credit for necessaries.[370]

The common law position was correctly stated in 1885 by Rose J. in Donnelly v. Donnelly:[371]

> By marital rights cannot be meant the right of a man to act as a brute towards a woman, in most cases practically defenceless. I do not believe in the theory seemed to be practically held by some, that a man at the altar purchased his wife to be his chattel or slave. *Where the home belongs to him, she must, I suppose, withdraw if he ill-treats her.*

Thus, in Ontario in 1885, as in England, there was no right to occupy the matrimonial home.

The notion that the rights of the spouses are *irrevocable* comes from Lord Denning's dicta in Bendall v. McWhirter which was discredited by the House of Lords in Ainsworth. Further, cases such as Hill v. Hill[372] show that a husband could revoke the wife's occupation of the matrimonial home by offering her alternative accommodation.[373] Of course, in speaking of the common law, the commentator above may have been referring to its development in Canada, but as we shall see, its development in Canada has met with no more success than in England; indeed its development has been curtailed by Canadian courts after the House of Lord's decision in Ainsworth. As in England some of the new legislation has sought to remedy the defects in the common law but because of the existence of homestead or dower legislation in some provinces, it is arguable that the need has not been so great.[374]

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[369] Italics mine.

[370] See Arsenault v. Bishop [1931] 2 D.L.R. 325, [1932] 2 D.L.R. 814 (N.B.C.A.); Scott v. Allen (1912) 26 O.L.R. 571 (C.A.); Price v. Price (1910) 21 O.L.R. 454 (Ont. H.C.); Clayton v. Clayton (1908) 9 W.W.R. 463 (B.C. Co. Ct.).

[371] (1885) 9 O.R. 673 at 674 (Ontario Common Pleas Division). Italics mine.

[372] [1916] W.N. 59.

(2) the development of the common law

In contrast with England, there has been very little litigation concerning a wife's right to occupy the matrimonial home. The Ontario Law Reform Commission [375] has attributed this to the fact that "there was not the same drastic housing shortage in the post war years as in England." But the cases that have been reported show the considerable impact which Lord Denning's doctrine in Bendall v. McWhirter has had.[376]

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[373] See also Stanley v. Stanley (1973) 11 R.F.L. 223 (B.C.S.C.). A wife's motion for an order permitting the wife and children to reside in the matrimonial home until alternative accommodation was provided was dismissed.

[374] See M.C. Cullity, "Property Rights During the Subsistence of Marriage," in Studies in Canadian Family law (D. Mendes da Costa ed. 1972) at 214.

[375] Ontario Law Reform Commission, Study prepared by the Family Law Project (1967) Vol. 1 at 85.

[376] As Bora Laskin wrote in "The Deserted Wife's Equity in the Matrimonial Home: A Dissent," 14 U. of T. L.J. at 67 "The 'equity' of the deserted wife to remain in the matrimonial home gained oblique entrance through Carnochan v. Carnochan in 1953, and was recognized again in Re Jollow v. Jollow in 1954, and in a third Ontario case in 1960, Willoughby v. Willoughby, was treated as an old friend."

However the latest decisions display the same debilitating effect which the House of Lord's decision in Ainsworth has had on that doctrine.

The doctrine's development, as we have seen above, owed much to the interpretation of section 17 of the Married Women's Property Act 1882. In all of Canada's common law provinces, except Alberta,[377] there was, until recently, legislation virtually identical to section 17 of the 1882 Act.[378] Ontario has proved to be fertile ground for decisions under the Act concerning the occupation of the matrimonial home. Canadian cases consistent[379] with Bendall v. McWhirter have been decided both before and after the House of Lord's decision in Ainsworth. But the possibility that Canada's common law has moved in a different direction from the common law as declared in Ainsworth appears extremely unlikely, given the emergence of decisions applying the House of Lord's decision in Ainsworth.[380]

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[377] Married Women's Act, R.S.A. 1970, c. 227. This Act does not provide a procedure for the resolution of property disputes between spouses as does the equivalent legislation in other common law provinces and so in Alberta there is not the same opportunity to graft the "deserted wife's equity" on to the common law via the Act. Cf. Margaret Donnelly, "Matrimonial Homes Possession" a presentation prepared for the Legal Education Society of Alberta Seminar - Matrimonial Property Practice - The New Deal." at 68.

[378] British Columbia: Married Women's Property Act, R.S.B.C. 1960, c. 233, s. 29; Saskatchewan: Married Person's Property Act, R.S.S. 1965, c. 340, s. 22 as amended by Stat. Sask. 1974 - 1975, c. 29, s. 1, to be repealed by Bill 63 of 1979; Manitoba: Married Women's Property Act, R.S.M. 1970, c. M70, s. 8; Ontario: Married Women's Property Act, R.S.O. 1970, c. 262, s. 12, repealed by the Family Law Reform Act, S.O. 1978, c. 2, s. 82 effective March 31, 1978; Newfoundland: Married Women's Property Act, R.S. Nfld. 1970, c. 227, s. 16; Nova Scotia: Married Women's Property Act, R.S.N.S. 1967, c. 176, s. 36; New Brunswick: Married Women's Property Act, R.S.N.B. 1967, c. M-4, s. 7; Prince Edward Island: Married Women's Property Act, R.S.P.E.I. 1974, c. M-6, s. 13 repealed by the Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 68 effective December 31, 1978.

[379] Carnochan v. Carnochan [1953] O.R. 887 affd. [1954] O.W.N. 543, (Ont. C.A). (1955) 4 D.L.R. 81, (S.C.C.); Jollow v. Jollow [1954] O.R. 895, (Ont. C.A.); see also Rush v. Rush (1960) 24 D.L.R. (2d) 248, (Ont. C.A.); Willoughby v. Willoughby [1960] O.R. 276, (Ont. C.A.); Cates v. Cates [1968] 2 O.R. 477; Audras v. Audras [1970] 2 O.R. 46, (District Court.)

There is no doubt, though, that even after Ainsworth there were decisions which took faltering steps away from the narrow path of the English common law. In 1966 Master Dunn stated:[381]

> A deserted wife in possession of the matrimonial home has an irrevocable licence to occupy the premises.... The right of the deserted wife to occupy the matrimonial home would appear to rest on a modern application of the common law right of a wife to pledge her husband's credit for necessaries.... (Bendall v. McWhirter cited).

Cullity made this comment in connection with Master Dunn's statement:[382]

> The ambiguity and implicit self-contradiction involved in applying the dicta in Bendall v. McWhirter while at the same time describing the deserted wife's right as one personal against her husband was placed under the floodlights in Richardson v. Richardson (1966) 2 O.R. 624.

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[380] Stevens v. Brown (1969) 2 D.L.R. (3d) 687, (N.S. Sup. Ct.), Ainsworth applied; Re Smyth v. Smyth (1969) 3 D.L.R. (3d) 409, (Ont. H.C.), Ainsworth and Richardson applied; Beauchamp v. Beauchamp (1970) 6 R.F.L. 43, (Ont. S.C. Chambers), Ainsworth cited; Maskewycz v. Maskewycz (1973) 13 R.F.L. 210, (Ont. C.A.), Ainsworth considered; cf. Richardson v. Richardson [1966] 2 O.R. 624, (Ont. S.C. Chambers), Ainsworth not cited; see also Re Hearty v. Hearty [1970] 2 O.R. 344, (Ont. H.C.); Re Perkins v. Perkins [1973] 1 O.R. 598, (Ont. H.C.); Bouey v. Bouey (1973) 9 R.F.L. 129, (Sask. D.C.)

[381] [1966] 2 O.R. 624 at 625, 626.

[382] M.C. Cullity, supra n. 374 at 215.

The contradictions, however, began to be resolved. In Beauchamp v. Beauchamp, it was suggested by Wright J. that:[383]

> The deserted wife has as against her husband the personal right to stay on in the matrimonial home until: (a) reasonably suitable alternative accommodation is provided for her; or (b) an alimentary payment has been assured or awarded to her...; or (c) she has been found guilty of adultery, for a husband has no obligation to support a wife who has committed adultery; or (d) the marriage has been dissolved by divorce or death of the husband; or (e) a court order has been made against her under section 12 (of Ontario's Married Women's Property Act)...The right to stay on will not prevail against a bona fide purchaser for value with or without notice...but the court will protect the right by injunction before sale.

This passage moves away from the full force of Denning's dicta in Bendall v. McWhirter and embraces Lord Wilberforce's exposition of the common law, the essential point of which was that a wife had no right to remain in the matrimonial home against her husband's will, whether she was deserted or not. In the subsequent case of Maskewycz v. Maskewycz[384] Arnup J.A. pointed out that Wright J's. remarks in Beauchamp v. Beauchamp were obiter. Arnup J.A. then stated:[385]

> Apart from statutory intervention...there is no difference in principle between the position of English spouses and Ontario spouses...It appears clear to me that the right of the wife (to remain in the matrimonial home) is based on what is called "the duty of married persons to live together." That duty is coupled, as to the husband, with his duty to maintain his wife, *including his duty to provide her with a home.*[386]

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383. (1970) 6 R.F.L. 43 at 49.

384. (1973) 13 R.F.L. 210.

385. Id. at 230.

386. Note that Arnup J.A. did not say that it is to be necessarily the matrimonial home, and yet see Galligan J's. dicta in Re Yale and MacMaster, infra n. 389.

It is possible that the learned judge was familiar with Denning's dicta in Gurasz v. Gurasz[387] for it seems that it was the unacknowledged inspiration for this passage. It is submitted that the common law as stated by Arnup J.A. does differ from the English position where it is quite clear that there is no right in a spouse to remain in possession of the matrimonial home, where that property is owned by the husband alone. Of course, the husband has a duty to support his wife but that support can be expressed in money or in alternative accommodation. Should he fail in his duty, the best the wife could do was pledge his credit and later to obtain maintenance.

My view of Maskewycz v. Maskewycz and Arnup J.A.'s misconception as to the position in England is supported by dicta in two recent decisions. In Makins v. Makins[388] Steinberg U.F.C.J. relied on the dicta of Arnup J.A. to hold that owing to a separation agreement, the duty of the spouses to live together, which forms the *basis of the deserted wife's right to remain in the matrimonial home* was mutually rescinded by the parties. In Re Yale and MacMaster[389] Galligan J. stated:

> As I read Maskewycz v. Maskewycz (1973) 13 R.F.L. 210, the Court of Appeal makes it clear that because of the special rights and duties which married persons have towards one another, *a deserted spouse may have a legal right to remain in the matrimonial home.*

It is extraordinary how Arnup's dicta has managed to elevate the English notion of a "wife's personal rights against her husband" to the status of a "legal right to remain in the matrimonial home".

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[387] [1969] 3 All E.R. 822.

[388] (1978) 2 R.F.L. (2d) 104 at 109.

[389] (1976) 18 R.F.L. 27 at 40, 41.

More in line with the English understanding of the common law and with the dicta of Wright J. in Beauchamp is the decision of Dubinsky J. of the Nova Scota Supreme Court in Stevens v. Brown.[390] The learned judge rejected counsel's final submission on behalf of the wife that she had a right to remain in the matrimonial home because her husband had deserted her. The learned judge quoted extensively from Ainsworth and the headnote reflects the tenor of the passages cited:[391]

> A deserted wife has no right to continue in possession of the matrimonial home nor any equity which she can claim against even one purchasing with full knowledge of the circumstances. The fact that the alternative accommodation offered by her husband is not acceptable to her or suitable for one or several of her thirteen children is not material. Her rights, such as they are, are personal and against her husband only. They do not run with or otherwise encumber his lands.

This recital of the strict position at common law is not unique in Canada's common law provinces. The true state of the common law has also been enunciated by the B.C. Supreme Court. In Korolew v. Korolew, Gould J. stated:[392]

> Another argument which would be convenient to deal with here is one raised on behalf of the defendant, that there lies in the defendant wife, assuming that she has been deserted... a common law right of continued occupancy of the matrimonial home...the matter (has been) dealt with by Seaton J. in the case of Bergen v. Bergen (1969) 68 W.W.R. 196...and at p. 197 Seaton J. said..."I proceed on the assumption most favourable to the plaintiff that there is no common law right to occupancy of the matrimonial home by a deserted wife..."

Gould J. conluded:

> I decline to find that there is any common law right of occupancy such as has been argued on behalf of the defendant.

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[390] (1969) 2 D.L.R. (3d) 687.

[391] Id. at 687.

[392] (1972) 7 R.F.L. 162 at 165.

By relying on Seaton J.'s assumption in Bergen, Gould J. does not found his reasoning on a very secure basis. It is worth noting that Cullity stated[393] that in Korolew Gould J. appears "to have gone to the other extreme and to have held that a deserted wife has no common law right to occupy the matrimonial home." With respect this "extreme" is completely consistent with the House of Lord's declaration of the common law and in particular with Lord Wilberforce's statement that:[394]

> the common law...does not recognise any right of the wife to remain in occupation of any of the husband's property against his will.

Later in his judgment, Wilberforce observes:[395]

> The essential point is that the wife had no right to be provided with, or kept in, any particular home...nothing in the various reforms which have taken place has altered the fundamental character of the wife's rights. They remain the right to cohabitation and support, and no more now than before 1857 has she, by virtue of her married status, any specific right to be provided with or maintained in any particular property.

Thus to say, as Cullity did, that Korolew has gone to the other extreme is to ignore the strict common law position. Despite its unconvincing basis, Korolew is in line with Ainsworth. In Ontario until recently,[396] there was merit in hedging the common law position with the procedural restriction that a husband could only get his wife out of the house by applying to the court under section 12 of the Married Women's Property Act. So even after Ainsworth, it could be said that the wife was protected procedurally from arbitrary eviction at the whim of the husband.

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[393] M.C. Cullity, 1977 Supplement to Studies in Canadian Family Law (D. Mendes da Costa ed.) at 73.

[394] (1965) A.C. 1175 at 1243.

[395] Id. at 1245.

[396] See now the Family Law Reform Act, S.O. 1978, c. 2.

But procedural restrictions must be distinguished from "rights." In my submission, there is no doubt that counsel for a husband could go to court and say: "A wife has no right to occupy the matrimonial home solely owned by her husband.[397] The husband does recognise his duty to support her and is prepared to offer her alternative accommodation and adequate maintenace."[398] This approach should meet with success everytime. To say, therefore, as McCaugan did in 1977, that a spouse's right to occupy the matrimonial home is "irrevocable"[399] is to miss the true nature of the common law. That is not to say that the common law is to be commended.[400] Legislation, such as the Matrimonial Homes Act and Dower Acts, has sought to make occupation virtually irrevocable, preventing dispositions without consent and more importantly allowing spouses to register their rights of occupation by land charge or caveat.

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[397] In this section I have been concerned with the situation where title to the home is in the husband's name alone. Where the husband and wife hold title to the home jointly, the wife has a legal right to remain in the home and so the common law position is not so critical.

[398] See Matty v. Matty (1968) 62 W.W.R. 62 (B.C.S.C. Chambers) cf. Re Campbell (1972) 9 R.F.L. 323 (B.C.S.C. Chambers). Maintenance order registered by wife against the matrimonial home solely owned by the husband. Security is a very real factor in assesssing maintenance. See also Huff v. Huff (1971) 4 R.F.L. 258 (Man. C.A.). Maintenance partly satisified by husband permitting his wife to occupy matrimonial home.

[399] Supra n. 368.

[400] Lord Denning did not have a high regard for the common law position. As he wrote in his recently published The Discipline of the Law (1979) at 315, "If I had time I would have told you more. I would have told how the deserted wife was given shelter only to find it rudely torn from her by the House of Lords."

But where propertyless spouses do not register, both statute and the common law can conspire together to defeat that spouse's desire to remain in the matrimonial home. As for the common law alone, save for a slight aberration in the 1950's and 1960's, it never did recognise the right of a wife to occupy a matrimonial home, solely owned by her husband.

(3) statutory intervention

(a) the western provinces' homestead legislation

In a sense statutory intervention goes back much further in Canada than in England; as Lord Wilberforce said in *Ainsworth*:[401]

> our law does not, as does the law in many places (particularly in the U.S.A. and Canada) recognise a "homestead" right of the wife...

But the rights given to wives by this legislation, although substantial, did not remedy the inadequacy of the common law. As against her husband alone, the wife's position is still insecure. As Cullity states in relation to the western province's Dower Acts:[402]

> In Alberta and Manitoba it seems to be established that the wife gets no vested proprietary interest in the property during her husband's lifetime.[403] Until his death she has

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[401] [1965] A.C. 1175 at 1256 F.

[402] *Supra* n. 374 at 226, 227. Italics mine.

[403] *Jackman* v. *Jackman* (1958) 15 D.L.R. (2d) 106, (Alta. S.C.A.D.), revd. on other grounds (1959) 19 D.L.R. (2d) 317, (S.C.C.); *Proskurniak* v. *Sawchuk and Sawchuk* (1959) 22 D.L.R. (2d) 768 (Alta. S.C.); *Overland* v. *Himelford* (1920) 52 D.L.R. 429, (Alta. S.C.A.D.); *Essery* v. *Essery* [1948] 1 D.L.R. 405, (Alta. S.C.A.D.); *Johnsen* v. *Johnsen* (1922) 66 D.L.R. 381, (Alta. S.C.A.D.); *Crichton* v. *Zelenitsky* [1946] 3 D.L.R. 729, (Man. C.A.); *Mennig* v. St. *Andrews* (1952) 4 W.W.R. (N.S.) 427, (Man. K.B.); *Pope* v. *Stevens* [1955] 2 D.L.R. 193, (Man. C.A.)

> merely a statutory power to prevent him from disposing of the homestead.[404] *Hence any right which she might have to reside on the property during his life must be based on her common law rights to cohabitation and support.* If her husband evicts her from possession her remedies are not proprietary in nature but are the normal remedies that she has against him for the enforcement of her matrimonial rights.[405] The position is probably the same in this respect under the Wife's Protection Act of British Columbia. If this is correct, then in each of the provinces mentioned, and subject to her power to prevent dispositions of the homestead, the wife's right to reside on the homestead will be governed by the same principles which apply in those provinces which have no homestead legislation.

In other words, the wife has to fall back on the common law which gives her no right to occupy the matrimonial home. Certainly there is nothing in the homestead Acts which give a wife the right to remain in the matrimonial home.[406] In none of the Acts does it state explicitly that the wife has an irrevocable right to occupy the homestead. In Alberta, should the husband sell the home without obtaining his wife's consent by swearing a false affidavit, the wife has merely the right to a sum of money once the transfer is registered. Of course, if the wife registers a caveat to protect her interest under the Dower Act, then the practical effect is to secure her right to remain in the home until her husband gets her consent to sell it or applies to the court for an order dispensing with the need to obtain her consent. But often wives do not register caveats and so their position is precarious. And what happens when the husband simply bars the door in order to prevent his wife from coming in? The Dower Act says that he needs her consent to sell the home but it does not say that she has the right to occupy the premises. Put simply, the homestead Acts do not give wives, any more than the common law, the right to occupy the matrimonial home vis-a-vis their husbands.

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[404] The dower rights which the wife will enjoy after her husband's death are treated, in Alberta, as contingent during his lifetime and, in Manitoba, as mere expectancies or possibilities: see the cases cited at n. 403 supra.

[405] See Jackman v. Jackman (1958) 15 D.L.R. (2d) 106 (Alta. S.C.A.D.), revd. on other grounds (1959) 19 D.L.R. (2d) 317 (S.C.C.).

[406] It differs from the English Matrimonial Homes Act which states that where a spouse is in the home, "rights of occupation" include the right to occupy the matrimonial home; where the wife has been forced out, the Act allows her to apply to the Court to be allowed entry into the matrimonial home.

It is not helpful, therefore, to discuss the Dower Acts in relation to the wife occupying the matrimonial home as against her husband. The Acts, however, are of particular value when third parties are involved and I propose to examine the homestead Acts in detail in relation to third parties under heading II.C.(2) below. As will be demonstrated, the Dower Acts have established a curious right of occupation, which is often good against third parties but not against husbands. The present section will examine provincial legislation, other than the homestead Acts, to ascertain the wife's position vis-a-vis her husband with regard to the occupation of the matrimonial home.

(b) other provincial legislation

In the Prairie provinces there is no recognition in the homestead Acts, as there is in the Matrimonial Homes Act, of the principle of "rights of occupation", so that where no caveat is filed a wife's protection is greatly diminished. As far as her right to occupy the matrimonial home as against her husband is concerned, the Acts are silent. They do not say that she has the right to occupy the home regardless of her husband's wishes. If he should exclude her by force, there is nothing in the Acts which provide for her return. Indeed the

Manitoba Act seems to envisage circumstances where the wife may be forced to leave the homestead without her consent in order to live with her husband elsewhere.[407] The Acts, therefore, do not guarantee a right of occupation so much as a right that property shall not be sold without consent, and as we will see below, that right is not an unqualified one.

For a while, other provinces, by design, achieved even less. In Nova Scotia[408] and in Prince Edward Island[409] and Ontario[410] until recently, a wife could not stop her husband from disposing of land which he owned; consent to dispositions was not required. This is the case in Nova Scotia today; the wife's rights to possession, rather than being precarious as in the Prairie provinces, are non-existent.

Only in British Columbia[411] and in Ontario[412] does the wife have rights which amount almost to the right of occupation. In B.C. the Wife's Protection Act[413] states that when the homestead is subject to a registered charge protecting the wife's rights,[414] any disposition by the husband without his wife's consent is *null and void for all purposes.*[415] This is different from the wording in the other legislation and provided the wife registers,[416] she is safe from devious schemes. If she does not register, there is nothing at common law or in statute preventing a husband from disposing of his property. However, lest it be thought that the B.C. Act is perfect, it is worth pointing out that even if a wife registers, there are occasions when she may be forced out of the home and there is nothing in the Wife's Protection Act which provides for a right to return which she can enforce. As in the other provinces, she may obtain maintenance and console herself with the right to prevent a sale of the homestead.[417]

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[407] R.S.M. 1970, c. D100, sections 4(3), (4).

[408] The Dower Act, R.S.N.S. 1967, c. 79; in the Yukon and in Newfoundland, there is no dower legislation; cf. the Northwest Territories, Matrimonial Property Ordinance, R.O.N.W.T. 1974, c. M-7.

[409] The Dower Act, R.S.P.E.I. 1974, c. D-17.

[410] The Dower Act, R.S.O. 1970, c. 135: See also Morrison v. Morrison (1917) 39 O.L.R. 163 (C.A.).

[411] Wife's Protection Act, R.S.B.C. 1960, c. 407.

[412] The Family Law Reform Act, S.O. 1978, c. 2. Statements made in connection with this Act apply equally to P.E.I. which has enacted similar legislation.

[413] R.S.B.C. 1960, c. 407, s. 4.

[414] Id., section 3.

In Ontario, the Dower Act[418] was repealed by the Family Law Reform Act.[419] In its place is a system which goes, unfortunately, only a small way towards guaranteeing spouses the right to occupy or possess the matrimonial home. In 1974 the Ontario Law Reform Commission stated:[420]

> it has become increasing apparent that the law governing the matrimonial home is uncertain, inadequate and in some respects,

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[415] See also section 5.

[416] Rousseau v. Rousseau (1956) 19 W.W.R. 257.

[417] See Gathe v. Gathe [1973] 1 W.W.R. 234 (B.C.C.A.). The Wife's Protection Act does not confer upon a wife an interest in property registered in the name of her husband. It does no more than protect the wife against a disposition by the husband of his interest in the property without her consent.

[418] R.S.O. 1970, c. 135.

[419] S.O. 1978, c. 2, s. 70.

[420] Report on Family Law, Part IV, Family Property Law at 131.

> chaotic. The present law reflects policies that were developed for different economic conditions and different social expectations that existed during the eighteenth and nineteenth centuries. This is an area in which the genius of the common law has failed, in a substantial number of individual cases, in its mission of doing justice...(L)egal reforms no less radical than the changes in the social structure during the last century are now essential in this area of the law. The Supreme Court of Canada has stated that these reforms must be accomplished through legislative actions, and not through the unsatisfactory process of change through litigation.[421]
>
> This Commission has carefully considered the present law dealing both with proprietary and occupational rights in the matrimonial home. The case for legislative intervention is unanswerable.

Against this background (which existed in England after 1965 and which was partially cured by the Matrimonial Homes Act of 1967) the Ontario legislature enacted the Family Law Reform Act.[422] Part III of the Act concerns the matrimonial home and section 40, unlike any other prior statutory provision in Canada's common law provinces, provides:

> Sec.40 - (1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home.[423]

This section embodies the Ontario Law Reform Commission's basic proposal[424] that the spouses should have joint control and equal rights of occupation in the matrimonial home. In fact, under section 40, as under the Matrimonial Homes Act, the propertyless spouse has recognisable "rights of possession" - something not to be found in the Dower Acts.[425] What happens, though, when one spouse (the legal owner) bars the door to the non-owning spouse? One commentator[426] has said that the courts will not necessarily make an order recognising that spouses have equal rights of occupation.[427] Exclusion orders will be dealt with below. The point is that, as against the husband, section 40 seems to ensure that a wife has more than the right to maintenance but the right to reside in the matrimonial home itself. The Act, however, is not perfect. It says that a spouse is equally entitled to any right of "possession" of the other spouse. "Possession" is not defined. Is it the same thing as "occupation?"[428] I think that there is no doubt that it must encompass "occupation" and include, for instance, the occupation of tenancies. More significantly, the Act does not say, as the Matrimonial Homes Act does, that if a spouse is in occupation, that spouse has the right not to be evicted or excluded, except by court order. As in the tradition of the Dower Acts, the Ontario Act restricts dispositions only. However, by providing that a spouse has an equal right to possession, the section may turn out to be a useful bargaining counter to be used against a spouse seeking to exclude his or her partner by unsanctioned methods.

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[421] E.g., in Thompson v. Thompson [1961] S.C.R. 3, and Murdoch v. Murdoch [1975] 1 S.C.R. 423; see also Maskewycz v. Maskewycz (1973) 13 R.F.L. 210.

[422] S.O. 1978, c. 2 with effect from March 31, 1978. P.E.I. followed suit with a statute of the same name and with almost identical sections to the Ontario Act, S.P.E.I. 1978, c. 6, with effect from December 31, 1978. There is a considerable amount of material coming out on the Ontario Act which at time of writing has not yet appeared; see J.C. MacDonald et al., Law and Practice under the Family Law Reform Act 1978 (Carswell, 1979); T.W. Hainsworth, Ontario Family Law Reform Act Manual (C.L.B. 1979); Family Law Reform Act and Domestic Contracts (Law and Business Publications, 1978).

[423] See also S.P.E.I. 1978, c. 6, s. 40 which is identical.

[424] Supra n. 420.

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[425] W.H. Holland, "Reform of Matrimonial Property Law in Canada," (1978) 1 Can. J. Fam. L. at 32 describes this section as creating "a much stronger right than was previously available."

[426] Id.

[427] To my knowledge no case has yet been reported on the meaning of section 40; see the Family Law Reform Act Reporter (1978 and continuing), F.L.R. Publications Inc.

[428] Cf. The Matrimonial Property Act, Bill 68 of 1979, section 5(2); exclusive possession includes the right of occupancy.

Section 41[429] allows both spouses to designate what property is to be their matrimonial home for the purposes of the Act; this designation is to be made by instrument, the form of which has been prescribed by regulation.[430] Unfortunately, the section says that *both* spouses *may* designate; there is no mandatory requirement and failing designation, the matrimonial home can be established subsequently by agreement or litigation. The designation, if made, is all important, for, as with English matrimonial homes encumbered with a Class F land charge, the disposition of a designated home can only be made with the consent of both spouses. It was unfortunate that the Act did not provide for a general registration scheme for the majority of spouses with only one matrimonial home. Section 41, moreover, is not happily worded and the necessity for both spouses to "designate" means that co-operation is essential and may not always be obtainable. Thus the Act will probably force spouses to obtain court orders for exclusive possession when a simpler registration procedure could have saved them that burden and expense.

Section 42 of the Family Law Reform Act provides:[431]

> 42(1) No spouse shall dispose of or encumber any interest in the matrimonial home unless,

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[429] See also S.P.E.I. 1978, c. 6, s. 41.

[430] See O. Reg 215/78 effective March 31, 1978.

[431] See also S.P.E.I. 1978, c. 6, s. 42.

> (a) the other spouse joins in the instrument or consents to the transaction;[432]
> (b) the other spouse has released all rights under this Part by a separation agreement;
> (c) the transaction is authorised by court order or an order has been made releasing the property as a matrimonial home; or
> (d) the property is not designated as a matrimonial home under section 41 and an instrument designating another property as a matrimonial home of the spouses is registered under section 41 and not cancelled.

Section 42(2),[433] not unlike some dower legislation, states that where a spouse disposes of the home in contravention of section 42(1) the transaction may be set aside *unless* the transferee acquired the home for value, in good faith and without notice that the property was a matrimonial home.[434] The situation, therefore, with regard to dispositions, is not that different from Manitoba and the effect of section 42 is similar to the effect of the Alberta Dower Act. Apart from joint-designations where there are two matrimonial homes, there is no provision for the wife to give notice to prospective purchasers of her "rights to possession." This serious omission coupled with the fact that, as in Alberta, consent can be evaded (and without penalty in Ontario) means that section 42 could turn out to be not that useful to a spouse who wishes to stay in the matrimonial home. If there is a sale without consent and if section 42(2) operated to deprive the wife of her "right of possession" - which clearly must cease when her husband's right ceases upon a sale to a bona fide purchaser - then presumably she is left with an action for a sum of money, although this is mot made explicit in Part III of the Ontario Act.[435] The same criticism applies to the P.E.I. legislation.

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[432] In the Ontario Law Reform Commission Report on Family Law, Part IV at 137 n. 6a, the Commission stated that "in providing for safeguards to ensure joint-control over the disposition of the matrimonial home, the Commission was greatly assisted by a study of the provisions of the Alberta Dower Act, R.S.A. 1970, c. 114."

[433] See also S.P.E.I. c. 6, s. 42(2).

[434] Cf. R.S.M. 1970, c. D100, s. 8(7).

Under this heading of "other provincial legislation", it is instructive to look at some of the homestead provinces' new legislation. In Alberta the Dower Act survives and the new Matrimonial Property Act[436] contains absolutely nothing about the spouse's right to occupy the matrimonial home as against her husband, outside of applications for exclusive possession orders. Section 28(1) provides:

> The rights under this Part are in addition to and not in substitution for or derogation of the rights of a spouse under the Dower Act.

As suggested above, the rights of such a spouse are to a sum of money and not to the occupation of the home. The philosophy of the common law provinces' legislation, therefore, is not hard to discern. As the Ontario Law Reform Commission put it:[437]

> It would be a measure of extreme and unwarranted last resort to enact a property law which served to abrogate the spouse's freedom of contract in relation to his major family asset.

In Manitoba there has also been new legislation and it has been no more far reaching that its Alberta counterpart, although it pretends to be. The Marital Property Act[438] begins with a preamble declaring marriage to

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[435] By section 65(3)(a) spouses can sue each other in tort.

[436] S.A. 1978, c. 20.

[437] Supra n. 420 at 135.

[438] S.M. 1978, c. 24/M45 effective October 15, 1978; and see generally the Manitoba Law Reform Commission, Working Paper on Family Law, Part I - The Support Obligation, Part II - Property Dispositions, January 1975, and see also, Manitoba Law Reform Commission, Report on Family Law Parts I and II, February 27, 1976.

"an institution of shared responsibilities and obligations between parties recognised as enjoying equal rights." Logically, therefore, if equal rights are to mean anything, where one spouse owns the matrimonial home, the other should have an equal right to occupy it and an equal right to say when it should be sold. Indeed, if equal rights are to exist at all, the matrimonial home should be jointly owned. The Act, however, does not live up to the preamble. Section 6 provides:

> 6 -(1) No provision of this Act, nor the giving of an accounting under Part II, vests any title to or interest in any asset of one spouse in the other spouse, and the spouse who owns the asset may, subject to subsections (7), (8), (9) and (10) and to any order of a court made under Part III, sell, lease, mortgage, hypothecate, repair, improve, demolish, spend or otherwise deal with or dispose of the asset to all intents and purposes as if this Act had not been passed.
>
> (2) Notwithstanding subsection (1), spouses each have an equal right to the use and enjoyment of their marital home, but the right is subject to any order of a court
> (a) made under the Family Maintenance Act;[439] or
> (b) made in or as incidental or ancillary to a proceeding in a matrimonial cause as defined in The Queen's Bench Act;[440]
> whereby one spouse is given possesion of the home to the exclusion of the other.
>
> (3) Notwithstanding subsection (1), spouses each have an equal right to the use and enjoyment of any family asset, other than their marital home, that is ordinarily used or enjoyed by both of them.

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439. S.M. 1978, c. 25/F.20 with effect from 15 October, 1978; 107th Manitoba Gazette (1978) No. 40; for a concise history of the Act, see Cameron Harvey, "Manitoba Family Law Reform Legislation and Succession," (1979) 9 Man. L.J. 247.

440. R.S.M. 1970, c. C280.

This is an astonishingly poorly worded section.[441] In section 1, which provides the definitions, a marital home can be an "asset" and a "family asset." "Marital home" itself is separately defined. Despite the linguistic contortion of section 6, all it seems to say is that title to the marital home is not altered by the Act and that spouses have an equal right to the use and enjoyment of the home so long as an order granting exclusive possession to one spouse has not been made. One commentator from Manitoba has explained the section's evolution in this way:[442]

> In The Marital Property Act enacted by the N.D.P. government the "marital home" provisions[443] virtually superseded the homestead life estate provisions of the Dower Act,[444] by providing that regardless of how the paper title to a "marital home" stood or was taken, a "marital home" was deemed to be owned by the spouses as joint-tenants. This joint-ownership of the "marital home" concept has been jettisoned by the Progressive Conservative government and the situation has been returned to virtually what it was prior to the spring of 1977. There are simply no provisions in the current Marital Property Act providing for joint-ownership of the homestead; thus Sections 3 to 14 of The Dower Act and the homestead life estate are in full vigour.

Harvey concludes:

> Section 6(2) itself may be of no significance, for it is likely that the non-owning spouse has as great a right to the use and enjoyment of the homestead by virtue of his or her inchoate interest under The Dower Act.

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[441] Ironically, Mr. Parasiuk (N.D.P.) referred to the legislation that the Marital Property Act replaced as "a dog's breakfast." Man. Legislative Assembly Debates, 1st Session, 31st Legislature, Nov. 24 - Dec. 12, 1977, V. 25, p. 403. The commencement of the Act was postponed for over a year owing to the belief that the only beneficiaries of the Act would be the lawyers engaged in litigation over its meaning.

[442] C. Harvey, (1979) 9 Man. L.J. 247, 248.

[443] S.M. 1977, C. 48, essentially, ss.1(c),(g),(1) and 3 - 7.

[444] R.S.M. 1970, c. D100 as am. by S.M. 1971, c. 82; S.M. 1974, c. 59; S.M. 1976, c. 69; S.M. 1977, c. 53; S.M. 1978, c. 27; essentially ss. 2(c),(e) and 3 - 14, 22, 27 and 33.

As we have seen the propertyless spouse's rights to occupy the homestead under The Dower Act are not that great and it is possible to conclude that the Manitoba legislature might just as well not have enacted section 6(2). It is unfortunate that the legislature did not take up the Commission's recommendation[445] that the marital home should become "by standard operation of the law the jointly owned property of both spouses." Also ignored was a recommendation[446] that the law should provide the propertyless spouse with the means to give notice of the character of that residence to the District Registrar and world at large. The result is that, as in Manitoba, Alberta and Ontario, there is no imposition of a joint-tenancy and so the registration provisions are vital to protect the precarious "equal right to the use and enjoyment of the marital home." It would seem, however, that in Manitoba, the ability to register a dower caveat has precluded any enactment giving the wife a power to register a "right of occupation" against the title to the matrimonial home.

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[445] Supra n. 93, Working Paper (1975) at 42, Report (1976) at 47.

[446] Id., Working Paper (1975) at 42, Report (1976) at 48..."Now there is no way that peoples' rights will jump right up automatically and assert themselves without human intervention. Just as the title to a homestead today does not necessarily bear any notation to that effect but may if the non-propertied spouse lodges a Dower Caveat, so title to a marital home will not necessarily, without some intervention, reveal itself to be the inseverable joint title of the spouses. The law should provide the non-title-holding spouse with the means to give notice of the character of that residence to the District Registrar and the world at large."

In British Columbia, the Family Relations Act[447] does not enshrine "rights of occupation". In keeping with the other provincial legislation, the Act speaks of each spouse being entitled to an interest in the family assets upon the breakdown of the marriage.[448] But the concern of this thesis is where the marriage is still alive and where one spouse's occupation is not based on legal rights and so is subject to the unilateral dealings of the other spouse. To counter such unilateral action, the B.C. legislature had enacted the Wife's Protection Act which has been considered above. To some extent, section 49[449] of the Family Relations Act has duplicated the earlier legislation:

> Section.49 - (1) A spouse who is party to a marriage or separation agreement may sign and file a notice in prescribed form setting out
> (a) the full name and last known address of each spouse who is a party to the marriage or separation agreement,
> (b) a description of land to which the marriage or separation agreement relates, and
> (c) the provisions of the marriage agreement or separation agreement that relate to the land described in the notice
> in the land titles office of the land titles district described in the notice situated.

Section 49(2) allows the Registrar to register the notice against the land and section 49(3) provides:

> (3) Where a notice is registered under subsection (2), the Registrar shall not allow registration of a transfer, mortgage, agreement for sale, or conveyance of the fee simple in the land, or lease of the land, unless each spouse or former spouse who is party to the marriage agreement signs and files in the land titles office a cancellation or postponement notice in prescribed form.

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[447] S.B.C. 1978, c. 20 with effect from March 31, 1979.

[448] *Id.*, section 43.

[449] As amended by S.B.C. 1978, c. 25, ss.333, 334.

Duplication, however, is not always undesirable. Unfortunately this section is limited by the condition that the registering spouse must be a party to a marriage or separation agreement. The section also envisages co-operation as the parties must state in the agreement what land is affected. But if these obstacles are surmounted, then not only can a spouse register a notice but section 50 provides that the spouse, whether she registers or not, can enforce the interest conferred by the agreement against her husband and also against third parties who have actual or constructive notice of her interest. These provisions, therefore, are capable of giving a spouse registrable and enforceable rights of occupation. Their scope is limited, but from a perusal of the recent statute law of the Canadian common law provinces it is fair to state that only the B.C. legislation has given serious consideration to the question of registration.

The newest piece of legislation in this area is Saskatchewan's Matrimonial Property Act.[450] Section 4 is similar to Ontario's section 40, although it is more clearly worded:

> Where one spouse has a right of possession with respect to a matrimonial home[451] ....both spouses are, as between themselves, equally entitled to the right of possession....

This section would seem to allow one spouse to claim that "rights of occupation" are given by the Act and that an owner spouse cannot simply turn the propertyless spouse out of the matrimonial home at will. Unfortunately there are no registration provisions for this right: as with all the other Acts the registration provisions concern exclusive possession orders. Section 43 also makes it plain that this Act does not establish joint-ownership of the home: strict property rights do seem to be restricted, however, by section 4.

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[450] Bill 68 of 1979, not yet in force.

[451] Comprehensively defined in section 2(g) of Bill 68.

B. The right of the husband to occupy the matrimonial home vis-a-vis his wife

(1) at common law and in equity

As in England, a wife has long been able to hold property in her own name, and so it is not uncommon for the wife to be the sole owner of the matrimonial home. But as the common law did not impose any duty upon the wife to support her husband,[452] there was not the same possibility of grafting upon the common law a right in the husband to occupy the matrimonial home which was his wife's own property.[453] Equity, of course, recognised the duty of the spouses to live together and as we have seen in section I.B.(1) above, the courts expressed reluctance to exclude husbands from property solely owned by the wife on the grounds that a husband should be able to enter the home and to enjoy the matrimonial consortium. In Donnelly v. Donnelly[454] the wife applied for a perpetual injunction restraining the husband from interfering with her hotel business of which she was the sole owner. The injunction was granted. Rose J., in the Common Pleas Division of the Ontario High Court stated that he would have excluded the husband from the hotel had he been asked. But in his judgment he did speak of the right a man has to enter a house owned by his wife. Of course, the learned judge qualified that right:[455]

> Where the home belongs to (the husband) she must, I suppose, withdraw if he ill-treats her. Where it is hers, I hope it

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[452] See Maskewycz v. Maskewycz [1973] 2 O.R. (2d) 713, 13 R.F.L. 210, (C.A.).

[453] Cf. Goad v. Goad [1970] 1 O.R. 346 (Ont. H.C.).

[454] Supra n. 371, cf. Till v. Till (1887) 15 O.R. 133 (C.A.).

[455] Supra n. 371 at 674.

> will prove to be admitted and well understood law, that he can only, to use the words of Cotton L.J., (in Symonds v. Hallett) "enter the house as a husband to enjoy the society of his wife, or to consort with her as his wife."

Donnelly is an example of equity recognising rights which were not recognised at common law. In Donnelly the dicta suggests that equity as administered by the Common Pleas Division discriminates against the wife. We know that in 1885 the common law would have lent the wife no assistance had she argued that she had the right to enter the matrimonial home solely owned by the husband to enjoy her husband's society, once he had barred the door. Equity should, but Rose J. stated that when the husband ill-treats his wife, "she must, I suppose, withdraw." There is no statement of a right to be there, and if the wife was barred from the door, she could seek restitution of conjugal rights, but failure on the part of the husband to comply would not result in the court enforcing her entry into the matrimonial home. In contrast, equity in the case of Donnelly seems to be stating that where the wife denies consortium, the husband has a right to enter the home which she owns to enjoy that consortium.[456]

The conclusion one is driven to is that equity only assisted a wife in relation to her own separate property and if that property was the matrimonial home, equity found the means of giving the husband a qualified right of occupation.

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[456] See Goad v. Goad, supra n. 453 ("Spouses have a duty to cohabit and in 'normal' circumstances the husband has a right to enter the matrimonial home." per Pennell J. at 353.

(2) the position today

(a) provinces with homestead legislation

The Alberta Dower Act[457] and the Manitoba Dower Act[458] apply to both husband and wife. The Saskatchewan Homesteads Act[459] and the British Columbia Wife's Protection Act[360] apply only to the wife. As we have seen the application of these Acts in relation to pure rights of occupation is not that significant. If the wife should bar the door, none of these Acts give the husband a right to return to the matrimonial home. In Alberta and Manitoba the wife is not to dispose of the homestead without her husband's consent but if she does, it is possible to argue that once the transfer is registered, it can rarely be set aside and in Alberta the husband's right is to a sum of money.

In Alberta[461] and Manitoba[462] a husband may caveat his interest in the matrimonial home but this only puts prospective transferees on notice and does not enable him to remain in the matrimonial home.

In the other common law provinces, until recently, the common law position as modified by equity prevailed. So, in Ontario, Newfoundland, Nova Scotia, New Brunswick and in Prince Eward Island the husband had no right at common law to enter the matrimonial home solely owned by the wife, although equity did recognise his right to enter the home to enjoy his wife's society. As Donnelly shows, the courts could enforce that right by refusing to grant injunctions in favour of the wife restraining her husband from interfering with her property or excluding him altogether.

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[457] R.S.A. 1970, c. 114.

[458] R.S.M. 1970, C.D100.

[459] R.S.S. 1965, c. 118.

[460] R.S.B.C. 1960, c. 407.

[461] Supra n. 437.

[462] Supra n. 435.

(b) statutory reform

In the last few years, however, statutory reform in many provinces has come to recognise that marriage is an institution of "shared responsibilities and obligations." Consequently in Ontario,[463] Manitoba[464] and Saskatchewan[465] there is legislation stating that a spouse is equally entitled to any right of possession of the other spouse in the matrimonial home or that each spouse has an equal right to the use and enjoyment of their marital home. These Acts do not give the spouse without a legal interest in the home registrable rights of occupation and it remains to be seen if these sections can be used by the husband to obtain an injunction allowing him to return to the matrimonial home where his wife has barred the door. The point is that in Manitoba and Ontario there does seem to be a recognition that spouses have a right to possession or an equal right to the enjoyment of the matrimonial home which would seem to amount to a right of occupation.[466] The new legislation in Alberta is virtually silent on the question of occupation outside of the sections providing for exclusion orders which will be considered under heading D.(3) below. It is unfortunate that these provinces did not give more consideration to the concept of rights of occupation; had they adopted one, then disputes over the matrimonial home might have been resolved out of court. At the moment it would seem that the new legislation will force parties to seek court orders for exclusive possession. To illustrate this, we have only to look at the situation in Alberta. If a husband excludes his wife from the house of which he is the sole owner, his wife has the option of seeking an order under the Matrimonial Property Act for exclusive possession of the home. Now if the Act had enshrined the concept of a right of occupation, the husband would know that his wife had a right to be in the home and had the Act stipulated means for the enforcement of this right of occupation, then the husband may well have hesitated before resorting to heavy-handed tactics. The same holds true for the wife.

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[463] Supra n. 454, section 40(1); see also the similar P.E.I. legislation, supra n. 455.

[464] Supra n. 470, section 6(2).

[465] Supra n. 482, section 4.

The fact is that none of these Acts have enshrined a comprehensive right of occupation and so husbands and wives will be coming to court to have the question resolved.

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466. In the Saskatchewan Matrimonial Property Act, Bill 68 of 1979, section 5(2) makes it explicit that the right to possession includes occupancy but this section applies only where exclusive possession orders are obtained.

C. The right of the wife to occupy the matrimonial home vis-a-vis third parties

(1) at common law and in equity

The proposition espoused by Bendall v. McWhirter that a wife's right to stay in the matrimonial home gives her an interest in that home which is valid in equity against the successors in title of the husband did not get firmly established in Canada's common law provinces.[467] In Re Smyth and Smyth[468] Pennell J. adopted the reasoning of the House of Lords in Ainsworth that a wife had no rights against third parties but merely personal rights against her husband for support.[469] As in England this personal right to support was virtually worthless but as we shall see, in those provinces with homestead legislation, a wife had considerable rights against third parties.

The common law, however, was not completely inadequate and is still important in those provinces without homestead legislation. The protection afforded, though, is limited. For instance, if third parties such as purchasers came to the attention of the wife, she could seek protection by applying for an injunction restraining her husband from disposing of the matrimonial home in order to defeat her personal right to support.[470] The wife could also ask the court to refuse to give effect to fraudulent or sham transactions.[471] Even so, it does seem that in the case of a Lee v. Lee injunction, the husband need only offer alternative accommodation, there being no right in the wife to remain in any particular property solely owned by the husband.[472]

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[467] But see Richardson v. Richardson [1966] 2 O.R. 624 at 626.

[468] [1969] 1 O.R. 617 at 621.

[469] See also Re Demaiter and Link [1973] 1 O.R. 140.

[470] See M.C. Cullity, supra n. 374 at 219, Lee v. Lee [1952] 2 Q.B. 489, Donaghue v. Donaghue (1973) 11 R.F.L. 305 (Ont. S.C.) (leave to appeal from an order in the form of Lee v. Lee not granted.)

At common law, therefore, the wife's position was insecure. A husband could sell the house over his wife's head and provided the transaction was bona fide and the wife did not prevent the sale by injunction, the purchaser could eject the wife upon completion. The same result would ensue when the husband became bankrupt or defaulted on mortgage payments to the point where foreclosure was sought.[473] In Canada legislation has attempted to balance the need of the family to have a roof over their head with the right of third parties to obtain that which is owing to them. In some of the common law provinces a course in favour of the wife has been taken, sometimes deliberately by legislation, sometimes in spite of that legislation by courts who seek to insure that the wife and children can remain in the matrimonial home.

(2) statutory intervention; the background to provinces with homestead legislation

In Alberta the legislative history of The Dower Act dates back to the time when the province was part of the Northwest Territories. I have taken the legislative history of the Dower Act from W.F. Bowker's article on "The Reform of the Law of Dower in Alberta."[474]

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[471] See M.C. Cullity, supra n. 374 at 219; Ferris v. Weavin [1952] 2 All E.R. 233.

[472] See eg. Hill v. Hill, supra n. 372, Stanley v Stanley, supra n. 373.

[473] See Stanley v. Stanley, supra n. 373.

> (i) The Northwest Territories took the law of England as of 15th July, 1870 and so common law dower as amended by the 1833 Dower Act became part of the law.
> (ii) The Territories Real Property Act 1886 abolished common law dower and curtesy.
> (iii) The Married Woman's Protection Act 1915 allowed husbands to deal with their land subject only to their duty of providing their wives with a home and accordingly the matrimonial home was placed beyond the risk of their speculation and dealings.
> (iv) The 1915 Act was repealed by the Dower Act 1917. This gave the wife a life estate in the homestead arising on the husband's death and provided that any disposition made without the wife's written consent was null and void.

Under the Dower Act of 1917 the wife in Alberta was afforded protection which did not exist at common law. Today the Alberta Dower Act[475] does not provide that any disposition without consent is null and void. Nor does the Act give the wife an irrevocable right to live in the house while the husband is alive. The husband is given the same rights as the wife. The philosophy espoused is very different from that enshrined in the Matrimonial Homes Act 1967 in England and owes its shortcomings or advantages, depending on one's point of view, to the Torrens system and to the esteem with which facility of transfer is held in the newer parts of the common law world. In many respects Alberta's Dower Act is similar to legislation in some of the other common law provinces,[476]

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[474] (1955-1961) 1 Alta. L. Rev. 501.

[475] R.S.A. 1970, c. 114.

[476] Manitoba: The Dower Act, R.S.M. 1970, c. D100 (applies to both husband and wife); Saskatchewan: The Homsteads Act, R.S.S. 1965, c. 118 (applies only to wives); British Columbia: The Wife's Protection Act, R.S.B.C. 1960, c. 407; cf. The Family Law Reform Act, S.O. 1978, c. 2, s. 70(2) which repealed the Ontario Dower Act, R.S.O. 1970, c. 135; and The Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 62(3) which repealed the P.E.I. Dower Act, R.S.P.E.I. 1974 c.D-17.

None of the Acts state that the wife can remain in the matrimonial home against the husband's will or provide the means for the wife to get back into the house, should she be barred from the door. The Acts do differ, however, in their treatment of dispositions made by the husband without his wife's consent. I propose to look first at the Alberta Dower Act and subsequently to compare it with other similar provincial legislation. Then, as in Section I.(C)(2) above I propose to examine certain types of third parties in turn to see what measure of protection a wife is afforded by statute and by the Courts.

The key provision of Alberta's Dower Act is section 3:[477]

> 3.(1) No married person shall by act inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
>
> (a) during the life of the married person, or
>
> (b) during the life of the spouse of the married person living at the date of the disposition
>
> unless the spouse consents thereto in writing, or unless a judge has made an order dispensing with the consent of the spouse as provided for in section 11.
>
> (2) A married person who makes any disposition of a homestead without the consent in writing of the spouse of the married person or without an order dispensing with the consent of the spouse is guilty of an offence and liable on summary conviction to a fine of not more than one thousand dollars or to imprisonment for a term of not more than two years.

When a disposition is made by a husband without his wife's consent and subsequently registered and where the transferee did not participate in the husband's fraud and is in all respects a bona fide purchaser for value,[478] then there is a strong argument for saying that the wife is not entitled to possesssion of the home.[479] In Alberta the wife is left with the satisfaction of seeing her husband fined or imprisoned and moreover may bring an action for damages against him[480].... if he can be found. The maximum sum which a wife can obtain is one-half of the purchase price or one half of the value of the property at the date of disposition, whichever is greater. This is not a right of occupation but rather a right to a sum of money. In connection with this Act the words of Scott J. in Choma v. Chmelyk are apposite:[481]

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[477] See generally Thom's Canadian Torrens System (2nd ed. 1962) 355-361.

[478] Shopsky v. Danyliuk (1959-1960) 30 W.W.R. 647 at 651-652, (Alta. S.C.A.D.) (second reason for the decision).

> I can find nothing in this Act envincing an intention to give the wife any interest in or control over the husband's homestead during his lifetime.

In Shopsky v. Danyliuk,[482] however, Milvain J. did find an intention within the Act to give the wife the power to set aside a registered disposition made without her consent - tantamount to creating a right of occupation:

> It is clear law that every contract made about a matter or thing which is prohibited by statute is a void contract: Bartlett v. Vinor (1693) Carth 251, 90 E.R. 750; Cope v. Rowlands (1836) 2 M & W 149, 6 LJ Ex 63, 150 E.R. 707; Drever v. Commercial Life Assur. Co. (1948) SCR 306...
>
> The general principle, above expressed, has been applied to contracts made in contravention of sec. 3 of The Dower Act, and such contracts held to be void: Pinsky v. Waas (1953) 1 SCR 399....; Meduk v. Soja (1958) SCR 167.
>
> When it is realised such legal principle exists, it becomes obvious why the legislature dropped from the Act, as surplusage, any reference to such a transaction being void. The contract being prohibited, it is void in law, unless the legislature expressly provides to the contrary.

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[479] See Essery v. Essery [1947] 2 W.W.R. 237, (Alta. S.C.A.D.) and see the case of Johnsen v. Johnsen [1922] 2 W.W.R. 272, (Alta. S.C.A.D.) cited therein.

[480] R.S.A. 1970, c. 114, s. 12.

[481] [1918] 2 W.W.R. 382 at 384.

[482] (1959-1960) 647 at 649.

However much this reasoning is to be commended, the fact is that the legislature deliberately omitted the words "null and void", not as surplusage, but for good reason;[483] deciding to substitute in place of the wife's right to occupy property at the expense of innocent purchasers, an action against her husband for half the purchase price.[484] Thus, it is respectfully submitted that Milvain J. did not give effect to the true meaning of the statute. The extraordinary thing about Shopsky v. Danyliuk is Milvain J.'s reliance on Pinsky v. Waas; in that case Estey J. said:[485]

> There is here present, in the actual context (of section 3 of the Dower Act) a clear intention that the agreement shall not be void but contemplates that the agreement may be carried out and a transfer pursuant thereto registered in the Land Titles Office; that upon such registration the land shall no longer be homestead [s.4(2)(1)] and thereafter the married person shall be liable to the spouse in damages [s.12(1)] which, when not recovered, may be satisfied from the assurance fund [s.2(b)(iii)]. *These sections indicate that the Legislature intended the agreement should be voidable rather than void, and emphasised that the position of the spouse prior to registration is quite different from that after registration.*

Milvain J. ignored this passage, holding the agreement to be void. In Shopsky the transfer was registered and it is respectfully submitted that the registered transfer could only be set aside on the second ground for that decision and not because the agreement on which it was founded was void.

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[483] See W.F. Bowker, (1955-1961) 1 Alta. L. Rev. at 505.

[484] W.F. Bowker, id. at 507 makes a very pertinent observation: "It is easy to point out that during the many years when the Act said the disposition was null and void, it was not, and now when the Act no longer says it is, it is. One may perhaps say with the benefit of hindsight that the Act might have been better framed."

[485] [1953] 1 S.C.R. at 406; italics mine.

The Saskatchewan and Manitoba legislation[486] has been framed a little differently and judicial interpretation has reflected this. In Keller v. Schultz[487] the Saskatchewan Court of Appeal held that the intention of the Homesteads Act was to prevent a sale of the homestead without consent and that consequently a wife could obtain an order for possession against the purchaser. Newlands J.A. stated:[488]

> The intention of the Homesteads Act is to prevent the husband from selling or otherwise parting with his home without his wife's consent, and this consent is required after his death before his personal representative can dispose of the same. *I think that the intention of the Act is to insure a married woman her home.* As it would be useless to her as a home if she could not live in it, I think she must necessarily be entitled to possession, and, therefore, the order of the trial judge was right, and the appeal should be dismissed with costs.

Similarly Elwood J.A. said:[489]

> The land has been found by the trial Judge to be the homestead of the plaintiff's husband. So long as it is the homestead of the plaintiff's husband, *the plaintiff and her family have the right to reside thereon,* and I apprehend that that right can only be interfered with when the plaintiff's husband has acquired a domicile different from the land in question, with the right to compel the plaintiff to reside with him, the land then would cease to be a homestead.
>
> The plaintiff at the present time, however, having the right to reside upon this land, she, in my opinion, has the right to possession of it as against the defendant.

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[486] The Homesteads Act, R.S.S 1965, c. 118; The Dower Act, R.S.M. 1970, c. D100.

[487] (1920) 53 D.L.R. 437, (Sask. C.A.); see also Audoorn v. Audoorn [1935] 2 W.W.R. 362 at 371 (Sask. C.A.); Friess v. Imperial Oil Limited (1954) 12 W.W.R. (N.S.) 151 and the cases cited at 155, 156. (As against a non-consenting wife every transfer intended to convey any interest in a homestead is invalid and void.)

[488] (1920) 53 D.L.R. 437 at 438, italics mine.

[489] Id. at 439, italics mine.

This passage makes it clear that the Saskatchewan courts have interpreted the Act so as to give a wife the right to the possession of the homestead. The interesting thing is that should the husband exclude his wife from her home, there is nothing in the Act or at common law enabling her to get back in; at best she can seek maintenance. But, should the husband sell the property without her consent, she can get back in. It is a curious "right of occupation" - seemingly good against purchasers but not against tyrannical husbands.

The same holds true for the Manitoba legislation. Section 3 of The Dower Act[490] is similar to section 3(1) of the Alberta Act, save for the addition of the words that dispositions made without consent shall be "invalid and ineffective." These words have significant implications. As Milvain J. stated in Shopsky v. Danyliuk:[491]

> I am mindful of the decision of our Court of Appeal in Essery v. Essery (1947) 2 W.W.R. 1044, in which non-compliance with The Dower Act did not defeat a title. However, in that case there was a bona fide purchaser for value, from the person who took the first transfer. The court there applied the principles underlying the Torrens system as established by our Land Titles Act, and upheld the title of the ultimate purchaser who had relied on the title created as a result of registration of the first transfer. In the Essery case at p. 1050 the late Chief Justice Harvey said:
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>> "The provision of The Dower Act which prohibits a married man from disposing of his homestead without his wife's consent and renders invalid any instrument purporting to do so, *while it makes such instrument invalid, does not make it completely ineffective,* for the Act expressly permits the registration of such an instrument accompanied by the prescribed affidavit, the truthfulness of which the registrar has no means of ascertaining, and even if the certificate of title issued on it might be open to attack anyone who in good faith and for value purchases

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490. R.S.M. 1970, c. D100.

491. (1959-1960) 30 W.W.R. 647 at 650, italics mine.

> the land relying on the registered title acquires an indefeasible title unless there is some provision of our Land Titles Act that qualifies that right."
>
> It is to be noted that the learned Chief Justice bases his determination on the Essery case on the fact that a purchaser for value had come upon the scene, and indicates that the original certificate might well be subject to attack up to the time of such purchaser arriving on the scene. In other words, a title is not sanctified merely because it has been issued.

A few points arise here. The Manitoba Act says that dispositions without consent are to be invalid and *ineffective*. Does this mean that if Essery were decided in Manitoba, the result would be different? I think not. As in Alberta and Saskatchewan, affidavits may be sworn that the husband is not married or that the land is not his homestead.[492] Section 8(7) of the Manitoba Act provides that the District Registrar need not inquire into the truthfulness of the instruments. The subsection also has important implications for transferees:

> (7)..., no person acquiring any right, title, or interest in land under or by vritue of an instrument or document in respect of which such an affidavit...has been made...is bound to make inquiry as to the truth of any of the matters therein alleged as facts; and no such document or instrument is invalid (unless the transferee had knowledge of the untruth of the matters or participated in the fraud.)

If a transferee's title is not to be impugned unless he is tainted with fraud, then not only would Essery be decided the same way in Manitoba, but furthermore, the first transferee could also be protected. If that is the effect of section 8(7) then the words "invalid and ineffective" in section 3 do not amount to much. However from the case law it would seem that as in Saskatchewan, the first transfer is assailable. The result is that the Saskatchewan and Manitoba legislation affords greater protection to a wife than the Alberta Act, although the case law in all three provinces has afforded considerable protection to the wife when faced with third parties competing with her for the occupation of the matrimonial home. This is illustrated by examining certain types of third parties in turn.

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[492] R.S.M. 1970, c. D100, s. 8(5).

(a) the purchaser[493] and mortgagee[494]

This has to be one of the most unsatisfactory areas of the law today. In Alberta, Saskatchewan and Manitoba, it is possible for a wife to set aside agreements for sale and sometimes registered transfers on the ground that she did not consent to the transaction. The disgrace is twofold. Firstly, the courts have allowed not only the wife to set aside sales, but also the husband and more absurdly, the purchaser on the ground of the wife's non-consent. Secondly, when registered transfers have been set aside, the courts have chosen to ignore the intent of the relevant statutory provisions.

(i) Alberta[495]

The registered transfer and Shopsky v. Danyliuk

Mr. Shopsky sold his farm to Danyliuk and the transfer was registered. Mrs. Shopsky sought to set aside the transfer on the basis that there was non-compliance with the Dower Act. Milvain J. set aside the transfer and the concern here is with his first reason and not with the second which involved fraud on the part of Danyliuk and which is undoubtedly correct. What is in issue is Milvain's statement that the contract was void.[496] Estey J. in Pinsky v. Waas[497] made it clear that these contracts are voidable. Therefore the result should have been as follows. Up to the registration of the transfer, Mrs. Shopsky could certainly set aside the sale, but upon registration her action is for damages alone. It is submitted that this should be the state of the law given a proper interpretation of the Dower Act, however, as the law stands in Alberta, registered transfers can be set aside and this gives the wife not only the right to set aside agreements for sale but also the right to occupy the matrimonial home as against third parties despite the fact that they may have obtained a registered transfer in good faith.

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[493] This thesis is not concerned here with a purchase from the original transferee. Such a purchaser, relying on the Certificate of Title of the vendor, cannot have his transfer impugned unless he is tainted fraud: See Essery v. Essery, supra n. 479.

[494] See R.S.A. 1970, c. 114, s. 2(ii)(A),(B); R.S.S. 1965, c. 118, s. 3, R.S.M. 1970, c. D100, s. 2(c).

[495] (1959-1960) 30 W.W.R. 647.

The agreement for sale

Here too the courts have been duped time and again in Canada, the Dower Acts have been used to aid fraud, or if that is too strong, then unquestionably, the Acts have been used to authorise sharp practice on the part of married vendors and purchasers. In simple terms, the technicality of non-compliance with the consent provisions of these Acts have enabled parties to refuse to complete otherwise valid contracts for the sale of land.

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[496] See also Ost v. Turnbull and Turnbull (1978) 7 A.R. 328 at 330 (C.A.) for a suggestion that such agreements are void.

[497] [1963] 1 S.C.R., 399 at 406. See page 156 above for the relevant passages from the judgment of Estey J.

McColm v. Belter and Belter[498]

A husband and wife agreed to sell their farm to Mr. McColm, the purchaser. Both the husband and wife signed the agreement for sale but they subsequently refused to carry out the agreement and the purchaser sued for specific performance or damages. The agreement was held to be unenforceable owing to non-compliance with the Dower Act. The Supreme Court of Canada decisions of Meduk v. Soja[499] and Pinsky v. Waas[500] were cited and were held to be authority for the proposition that lack of consent renders an agreement for sale ineffective. In McColm, McDermid J.A. stated:[501]

> In effect, the Dower Act defines what is needed to constitute a consent, and a mere signature by a spouse to an agreement, which complies with neither s. 5 nor s. 6, cannot, in my opinion, be a consent as envisaged and as ordered by s. 3 in order to make a valid disposition inter vivos by the other spouse.

There are valid policy reasons for setting aside agreement for sale where a wife has not given consent in the proper form[502] and one cannot object to a wife applying to the court to set aside a sale once she realises what her rights under the Dower Act are. But why, as in Martens

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[498] (1975) 18 R.F.L. 191 (Alta. S.C.A.D.).

[499] [1956] S.C.R. 167.

[500] Supra n. 510.

[501] Supra n. 498 at .

[502] See also Worton and Worton v. Sauve and Sauve [1978] 9 A.R. 328 (Alta. D.C.); cf. Ost v. Turnball supra n. 496.

v. Burden and Burden,[503] should the husband be able to repudiate the transaction on the ground of lack of consent on the part of his wife? In Martens, what was particularly repugnant was that the wife appeared to want the sale to go ahead and yet the husband succeeded in backing out of his obligations based on the technicality of his wife's non-consent. If husbands enter into sales freely, then it is unquestionably wrong for them to be able to use the Dower Act to get out of the bargain, especially where their wives want the sale but have not consented in the proper form. The conclusion is somewhat ludicruous for the wife is able to occupy the matrimonial home vis-a-vis third parties even though she does not desire that occupation.

A return to sanity: Senstad v. Makus[504]

In this case the husband attempted to set aside a sale and failed. Makus accepted an offer from Mr. Senstad to buy a farm. The court found that section 3 of the Dower Act had been complied with but that there was no acknowledgement by the wife as contemplated by section 6. The court held that the Dower Act had been complied with and specific performance was ordered. At the very least, this decision sets the bounds as to how far husbands can go in order to evade valid obligations. Once a wife has complied with section 3, she has no right to remain in the matrimonial home vis-a-vis purchasers.

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[503] [1974] 3 W.W.R. 522. (Alta. S.C.T.D.).

[504] (1976) 20 R.F.L. 269; See also Paulinko v. Bower (1975) 18 R.F.L. 62; Amyotte v. Urchyshyn (1978) 6 Alta. L.R. (2d) 26 (an acknowledgment of consent was proper on its face and the spouse could not say that the consent was improperly acknowledged in order to repudiate a contract for the sale of land.); McFarland v. Hauser et al. [1979] 1 S.C.R. 337 at 348-352.

(ii) Saskatchewan

The Homesteads Act is very different from Alberta's Act but there is a provision[505] which suggests that contracts might only be voidable up until registration and that if the transferee is not tainted with fraud[506] it seems possible to argue that an instrument forging the wife's consent can create a valid and effective title. But as has been shown in Keller v. Shultz above[507] a certificate of title can be set aside for want of consent and so it appears that in Saskatchewan, wives have the right to occupy the matrimonial home in almost all cases against purchasers, where their consent has not been validly obtained.[508]

(iii) Manitoba

The "invalid and effective" addition to section 3 of The Dower Act suggests that contracts entered into without consent cannot only be set aside but are void and cannot give rise to a valid certificate of title. It is possible, however, to argue that section 8(7) makes such contracts voidable and that upon registration the certificate of title is unimpeachable.

In the area of agreements for sale the criticisms outlined above in relation to the Alberta Act apply here. The case of Rose v. Dever[509] is an example of the Dower Act being used improperly. Freedman

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[505] Section 7(3).

[506] Section 1.

[507] Supra n. 487.

[508] See Collard v. Collard (1977) 28 R.F.L. 252.

[509] [1972] 2 W.W.R. 431 (Man. C.A.).

C.J.M. purported to follow Meduk v. Soja in reaching his decision:[510]

> Clearly (Meduk v. Soja) establishes that, without the consent in writing of the spouse, the owner's acceptance of an offer respecting homestead property is ineffective to form a contract. If no contract exists, no one is bound. Withdrawal therefrom is accordingly possible.

The court allowed this reasoning to enable a purchaser to withdraw from a contract because the vendor's wife had failed to furnish consent in the proper form to the sale. This is as unmeritorious as allowing the wife's husband to withdraw from the sale. Only the wife should be able to use the Act in these circumstances. The court did not seem to welcome the result and contented itself with a direction that there would be no order as to costs there or at trial, despite the fact that the defendant purchaser had won in law.[511] The point is that the court allowed the Dower Act to be used as an instrument of fraud[512] or at least as an instrument enabling a purchaser to evade his obligations. The end result is that the wife is often secure in the matrimonial home whether she wants to be or not.

(b) trustees

When the husband occupies the matrimonial home pursuant to the terms of a trust the wife is not in a secure position. Dispositions in these circumstances are made by trustees who hold the legal estate and not by the husband, so there is no requirement that the trustees are to obtain the wife's consent first. Accordingly, the husband and trustees could conspire together to defeat the wife's occupation of the matrimonial home.

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[510] Id. at 439.

[511] The order as to costs was made respectable on the basis that the defendant had raised two other defences which had taken up much time and had failed.

[512] In Chand and Chand v. Sabo Bros. [1978] 1 W.W.R. 428 at 430 (Alta. S.C.T.D.) Dechene J. said that "Repudiation of a contract might be said to make The Dower Act an instrument of fraud.

(c) Execution creditors and trustees-in-bankruptcy

It is here that the philosophy of some of the homestead provinces departs in a marked way from the position taken by the law in England. In England a wife has no right to occupy the matrimonial home when the husband becomes bankrupt, either at common law or under the Matrimonial Homes Act 1967. But in some Canadian provinces, the claims of the husband's creditors are not preferred to those of the wife. As Dr. Stone wrote:[513]

> The Homestead Acts in the United States have spread north and east from the community property states in the south-west. They are not directly linked to community of property between the spouses, but are based on a different view of creditor's rights, viz. that the needs of the family should be met before debts are paid. This is contrary to the common law approach.

For instance, in Alberta the Exemptions Act[514] provides that the homestead of an execution debtor is exempt from seizure under any writ of execution as long as the homestead does not exceed 160 acres. Section 2(k) of the Act provides that the house actually occupied by the debtor is similarly exempt if its value does not exceed $8,000. Needless to say, with today's inflation there are not many matrimonial homes in that price range and so in reality spouses do not get to stay in the matrimonial home to the detriment of debtors. The common law approach therefore is only slightly abrogated in the homestead provinces.

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[513] Family Law (1977) 93 at n. 121.

[514] R.S.A. 1970, c. 192 s. 2(j). See also similar legislation in the other common law provinces; The Homesteads Act, R.S.B.C. 1960, c. 175, ss. 5,6 (registered homestead with a value of not more than $2500 exempt); The Exemptions Act, R.S.S.1965 c. 96, s. 6; The Judgments Act, R.S.M. 1970, c. 510; cf. The Execution Act, R.S.O. 1970, c. 152.

As against the husband's trustee-in-bankruptcy, a wife has little protection[515] other than her exemptions, and this has not been changed by the new legislation.[516] For instance, in Saskatchewan, section 13 of the Matrimonial Property Act[517] provides:

> No right of exclusive possession of a spouse ordered under this Part continues after the rights of the other spouse as owner or lessee or of both spouses as owner or lessee, as the case may be, are terminated.[518]

Thus when the husband, as owner, loses his legal right to possess the matrimonial home, owing to bankruptcy, then even though his wife may have an exclusive possession order, her rights to possession cease.

(d) landlords

Many matrimonial homes are rented, however, Canada's common law provinces are not blessed with complicated regulation under Rent Acts, as is the case in England.[519] The result is that the wife is not in a secure position when living in rented accommodation of which the husband is the sole lessee. In the homestead provinces, however, the wife is given a measure of protection and it seems that the Dower Acts will enable the wife to prevent the husband and landlord getting away successfully with a Middleton v. Baldock scheme.[520] For instance, should the husband attempt to surrender his lease, that can be viewed as a disposition under the Dower Acts and consequently ineffective without the consent of the wife.

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[515] See e.g. Tripp v. Gray et al. [1978] 4 W.W.R 543. (Sask. D.C.) (Matrimonial home jointly-owned. Husband declared bankruptcy. Home sold). See also Royal Trust Co. v. Dekker [1978] 6 W.W.R. 577.

[516] But see Family Law Reform Act, S.O. 1978 c. 2, s. 43; a spouse has the same right of redemption as the other spouse has and is entitled to notice respecting any claim just as the other spouse is so entitled.

[517] Bill 68 of 1979, section 13.

[518] See also The Family Maintenance Act S.M. 1978, c. 25/F.20, s. 10(3).

[519] See e.g. The Landlord and Tenant Act 1978, proclaimed in force July 1, 1979.

The new legislation has also resolved some of the difficulties in this area. In British Columbia, Alberta, Saskatchewan, Manitoba and Ontario the definiton of "matrimonial home" includes rented accommodation, either explicitly or owing to a wide general definition. But none of these Acts state expressly that occupation of the wife is to be treated as occupation by the husband and that, in the style of the Matrimonial Homes Act, payment of rent by the wife is as good as payment by the husband. Some of the Acts, however, do give the wife some useful protection which was perhaps inspired by the Matrimonial Homes Act of 1967. In Ontario, Section 43 of the Family Law Reform Act provides that a spouse has the same right of relief against forfeiture as the other spouse and so where a landlord attempts to obtain a possession order the non-tenant can not only claim relief but is also entitled to notice of the proceedings. Section 43(3) is also beneficial in that when a non-tenant spouse pays arrears of rent to the landlord owed by the other spouse, that money *shall* be applied in satisfaction of the claim giving rise to forfeiture.

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[520] Supra n. 336.

But where a spouse breaks a covenant in the lease so as to allow the landlord to terminate his right to possession, or where the landlord has actually obtained a possession order, then as we have seen above,[521] the new legislation gives the other spouse no rights against the landlord to remain in the premises.

(3) registration and homestead legislation

Up until now I have discounted registration and proceeded on the basis (which seems to be the common practice) that wives do not register by caveat their interest in the husband's homestead which is given to them by the Dower Acts. The results of dispositions without consent can be summarised diagrammatically in this way:

Alberta	H & W $\longrightarrow$	bona fide purchaser (BFP) - if *Shopsky* v. *Danyliuk* is good law, this transfer can be set aside. If the decision is wrong, W has only an action for damages against her husband.
	H & W $\longrightarrow$ BFP^1 $\longrightarrow$ BFP^2	- *Essery* v. *Essery* shows that as BFP^2 relied on the register, he gets good title and the sale cannot be set aside by the wife.
Manitoba & Saskatchewan	H & W $\longrightarrow$	BFP^1 - this sale can be set aside by the wife as the Acts seem to give her the right to occupy the matrimonial home.
	H & W $\longrightarrow$ BFP^1 $\longrightarrow$ BFP^2	- BFP^2 gets good title as he has relied on the register and see eg. section 8(7) of the Manitoba Act and *Deputch* v. *Kurmey*.[522]

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[521] *Supra* n. 517.

[522] (1964) 48 W.W.R. (N.S.) 45 (Sask. Q.B.).

There is no doubt, therefore, that a wife has some control over the matrimonial home through the giving of consent, and should it be evaded, in some provinces the wife can get her home back. In Alberta, however, it does seem that even after the first registered transfer she will lose possession. Where there are purchasers from the person who took the first transfer, then no matter which province she is in, a wife has no rights against the ultimate transferee unless he is tainted with fraud.

A wife can avoid these problems by simply caveating her interest. The wife can do this in Alberta owing to the decision in Rigby v. Rigby.[523] In Saskatchewan[524] and Manitoba[525] there is express statutory provision enabling the wife to file a caveat to protect her rights in the homestead. Such a step will make potential purchasers reluctant to deal with the land and should her husband seek to vacate the caveat, that may well be read by the wife as a signal to apply to the court for an order for exclusive possession of the matrimonial home.[526]

(4) the husband's position vis-a-vis third parties when his wife owns or leases the matrimonial home

All that has been written about the wife's position applies equally to the husband, save in Saskatchewan and B.C. where the Homesteads Act and Wife's Protection Act apply only in favour of the wife. In Alberta and Manitoba the husband can file a caveat against the homestead with all consequent protection that that affords. And even where he does not register, the case law suggests that he too can set aside agreements for sale and registered transfers on the ground of non-compliance with the Dower Act, thus giving him the right to occupy as against purchasers and mortgagees. In relation to trustees the husband is in a weak position, although as against his wife's creditors or trustee-in-bankruptcy, the Exemption Act legislation can aid him, just as it can the wife, preserving for them both a home provided it is not a substantial property. In Ontario and P.E.I. the spouse is given the same right of redemption or relief against forfeiture as the other spouse[527] which means that a husband has some measure of protection against third parties provided he obtains notice, responds in time and can come up with the money.

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[523] [1922] 1 W.W.R. 397 (Alta S.C.A.D.). The court held that a wife has such an interest in the matrimonial home as to entitle her to file a caveat to protect that interest.

[524] The Homesteads Act, R.S.S. 1965, c. 118, s. 8.

[525] The Dower Act, R.S.M. 1970, c. D100, s. 27.

[526] For instance, in Alberta under the Matrimonial Propety Act, S.A. 1978, c. 20, s. 19.

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[527] Family Law Reform Act, S.O., 1978, c. 2, s. 43; the P.E.I. provision is the same.

D. The power of the spouse to terminate the other spouse's occupation of the matrimonial home

As in England there are various ways in which a spouse can exclude the other spouse from the matrimonial home. I propose to follow the same format as used in section I.D. above. Powers derived solely from the legal right to occupy will be considered first. That will be followed by an examination of powers conferred by joint-ownership, such as orders for partition and sale. The section will conclude with a treatment of powers which can be invoked irrespective of ownership under old and new legislation.

(1) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where the home is owned by the husband

(a) the husband's powers at common law

There is no doubt that a husband will have difficulty in the homestead provinces excluding his wife from the home by attempting to sell it without her consent. But should he simply bar the door there is nothing in those Acts giving the wife a right to return. A more sophisticated possibility at the disposal of the husband would be to sue his wife for possession, but counsel for the husband would have to argue that the action was not founded in tort.[528] Of course, where there is no inter-spousal tort immunity as in Ontario and P.E.I.[529] there would not be the same technical difficulty in suing a spouse for possession. But there are problems and the husband would probably have to provide alternative accommodation or at the least, satisfactory maintenance.[530]

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[528] See National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175 at McCullity, supra n. 374 at 219ff.

[529] See the Family Law Reform Acts, S.O. 1978, c. 2, s. 65(3)(c) and S.P.E.I., 1978 c. 6, s.60(3)(c). Under this new legislation the spouses have an equal right to possession and so the courts would likely prefer applications under the new Act for exclusive possession to suits based on strict property rights.

(b) the wife's powers at common law and in equity

Donnelly v. Donnelly suggests that where the wife is treated badly, her only recourse is to leave the matrimonial home. In Canada, however, a husband can be excluded from his own home if the wife is being pressured not to petition for divorce.[531] The injunction pending suit will be discussed fully below but it is one way of overcoming legal rights of occupation on a temporary basis.

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[530] In Newfoundland, The Married Women's Property Act, R.S. Nfld. 1970, c. 227, s. 13 provides that no husband or wife shall be entitled to sue the other in tort, and yet in Bussey v. Bussey (1975) 8 Nfld. P.E.I. 504 (Nfld. S.C.) the husband obtained judgment for possession of the matrimonial home after a decree nisi had been granted but before decree absolute. In that case provision by the husband of alternative accommodation for the wife was not required by the Court. Cf. Moore v. Moore (1975) 26 R.F.L. (N.S.S.C.) Matrimonial home owned by the husband and possession order obtained by the husband after decree absolute.

[531] See Hastings v. Hastings infra n. 567 and see Silverstone v. Silverstone, supra n. 120 and heading I.D.(1)(b) above.

(2) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where the home is owned by the wife

(a) the wife's powers at common law and in equity

As we have seen in Donnelly v. Donnelly above, the courts have been prepared to exclude the husband from property owned by the wife when the husband is interfering with that property to its detriment or where he places himself in a position of a stranger in relation to his wife. As stated in Stetz v. Stetz:[532]

> thereafter he no longer had any right to retain possession of the property against her wishes or to treat it as if it were still their marital home.

On the other hand, equity has been reluctant to allow a wife to evade the duty of the spouses to live together.

Other than the injunction to protect the wife's property, there is also the possibility of the wife suing her husband for possession, especially in Ontario and P.E.I. The problem in those provinces, however, is that the new legislation which abolishes the inter-spousal tort immunity gives to the spouses an equal right to the use and enjoyment of the matrimonial home. This may present problems to a wife who wishes to sue for possession and she may well have to apply for an exclusive possession order under the new Act as opposed to establishing a case based solely on legal rights.

Another possibility which the wife could utilise is an application under the Married Women's Property Act for exclusive possession of matrimonial home. In Laprairie v. Laprairie, Lieff J. stated[533] that a husband who has been deserted has a right of occupation of the matrimonial home apart from any question of ownership but that this right is more readily taken away from him than it would be from a wife because it is based upon his status as a husband alone and not upon any right to support.[534] Although a husband's occupation may be terminated more easily under these Acts, this legislation is decreasing in importance and no longer exists in Saskatchewan, Ontario and P.E.I.

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[532] [1946] 2 W.W.R. 72 at 87 (Sask. C.A.); see also Labrash v. Labrash (1964) 50 W.W.R. 242 (Sask. D.C. Chambers).

(b) the husband's position

As in England, although a husband had a right to enter the matrimonial home[535] to enjoy his wife's society and the matrimonial consortium, neither equity nor the common law ever entertained a husband's suit to exclude the wife from her own property, unless of course, he could show that he had a beneficial interest in the property or that his wife was holding title to the home on trust for him.

(3) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where it is jointly owned

Where the matrimonial home is jointly owned and there is a disagreement as to the continuation of the joint tenancy, the party who wishes to bring it to an end can apply to the court to do so under the Partition

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[533] (1976) 29 R.F.L. 207 at 209.

[534] See Maskewycz v. Maskewycz (1973) 13 R.F.L. 210 at 238, Knight v. Knight (1975) 20 R.F.L. 381.

[535] See eg. Laprairie v. Laprairie, supra n. 533.

Acts. M.C. Cullity has commented on the operation of this legislation:[536]

> The one difficult problem which arises with any frequency in this situation concerns the extent to which the rights of a co-owner to obtain partition or sale are qualified or restricted by the marital rights of the parties. As has been seen it is implicit in some of the opinions delivered in National Provincial Bank Ltd. v. Ainsworth that the latter rights should be regarded as relevant whenever questions relating to the enforcement of the title to or the possession of property arise between spouses. In Canada, the authorities in the common law provinces do not fall into a single coherent pattern. The question is complicated not only by the existence of the homestead legislation in some jurisdictions but also by variations in the statutory provisions under which applications for partition may be made, together with doubt as to the relationship between those provisions and the discretionary jurisdiction of the court under the Married Women's Property Acts.

One might add that the question is also complicated by doubt as to the relationship between Partition and Sale provisions and the new provincial legislation such as the Matrimonial Property Act in Alberta.[537] In fact this problem is being resolved, athough the area in all provinces is in drastic need of revision. The trend seems to be one of recognising that the enforcement of strict legal rights has little relevance today in the resolution of disputes over the occupation of the matrimonial home. Recognition of this has come recently from Ontario and British Columbia and as partition or sale of the matrimonial home under the Partition Acts will cease to be of importance in Canada, as it already has in England, I do not propose to examine the area in detail. This course is dictated by cases such as Re Cipens and Cipens[538] and Hawrysh v. Hawrysh.[539] In Re Cipens the husband applied for partition and sale of the matrimonial home and the wife cross-applied for exclusive possession. Steinberg J. of the Unified Family Court held that the Partition Act had been superseded by the Family Law Reform Act 1978 and that:[540]

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[536] M.C. Cullity, supra n. 374 at 229.

[537] S.A. 1978, c. 20. For instance, s. 21 says "An order made under Part 2 for exclusive possession of the matrimonial home takes effect notwithstanding an order under Part 1 or a subsequent order for the partition and sale of the matrimonial home." But what happens if the order for sale is prior to a Part 2 application and will a prior partition application prevail over a later application under Part 2?

> the mere right of ownership of property as joint-tenants did not of itself entitle either of the spouses to partition and sale.

In Hawrysh the wife applied unsuccessfully for an order of partition and sale of the jointly-owned matrimonial home. Davies L.J.S.C. stated that he was in agreement with the reasoning in Kraemer v. Kraemer and McGill[541] in which it was held that the Family Relations Act 1972[542] should take priority over the Partition Act.[543] The 1972 Act was repealed on March 31, 1979 and section 55 of the new Family Relations Act[544] states that orders under Part 3 concerning the distribution of the matrimonial home are to prevail over the Partition Act and Married Women's Property Act.

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538. (1978) 21 O.R. (2d) 134. The annotation to Cipens v. Cipens (1979) 7 R.F.L. (2d) at 237 is worth noting. "The decision emphasises the confusion which has been apparent regarding possessory rights under The Family Law Reform Act 1978 and at the same time goes some distance in clarifying it."

539. 18th April, 1978, Family Law, Volume 1, C.C.H. Canadian, (New matters) para. 29,190, (B.C.S.C.).

540. (1978) 21 O.R. (2d) 134 at 136.

541. (1977) 4 B.C.L.R. 289 (B.C.S.C.).

542. S.B.C. 1972, c. 20, s. 8.

543. R.S.B.C. 1960, c. 276, s. 3.

544. S.B.C. 1978, c. 20.

(a) Alberta

The current law relating to orders for partition and sale in Alberta is embodied in three English statutes which are no longer in force in England.[545] These three statutes would no longer apply in Alberta had Bill 74[546] of 1978 been passed by the Alberta Legislative Assembly. The Bill died in the fourth session of the 18th Legislature and the Conservative Government has not re-introduced it.

It is the Partition Act of 1868 which has been used by spouses to obtain a sale of the jointly owned matrimonial home. Section 3 of the Imperial Act gives the court a discretion to order a sale rather than a physical division of the home and section 5 allows one party to buy out the other party's share.[547] For a while it was thought that partition was a matter of right in Alberta[548] but the subsequent cases of Clark (Clarke) v. Clarke[549] and more recently, Re Kornacki and Kornacki[550] have established the existence of a discretion to refuse partition and sale. The position was summarised by the Institute of Law

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[545] Act for Joint Tenants and Tenants in Common, 1539, 31 Henry VIII, c. 1; Act for Joint Tenants for Life or Years, 1540, 32 Henry VIII, c. 32; The Partition Act, 1868, 31, 32 Vict., c. 40.

[546] The Partition and Sale Act 1978, Bill 74, clause 18.

[547] Wagner v. Wagner (1970) 73 W.W.R. 474; Smith v. Smith [1976] 1 W.W.R. 510.

[548] Wikstrand & Mannix v. Cavanaugh & Dilion [1936] 1 W.W.R. 113.

[549] [1974] 1 W.W.R 488 affd., [1974] 5 W.W.R. 274 (husband requested a sale and not partition. Allen J. held that order for sale is discretionary).

[550] (1976) 58 D.L.R. (3d) 159 (Alta. S.C.A.D.) (application for partition and sale of the matrimonial home. Court has discretion to refuse partition or sale). Cf. Elligott v. Elligott (1977) 6 A.R. 282 (S.C.T.D.) where Greschuk J. refers to Re Kornacki and then holds that the right to partition is non-discretionary but a Court is not bound to make an order for sale.

Research and Reform in this way:[551]

> there is in the case of a matrimonial home a discretion to refuse either partition or sale, the purpose being to permit the wife or former wife to remain in the home.

The inter-relation between the Partition Act and the new Matrimonial Property Act should result in some important and far-reaching caselaw.[552] Will the Alberta courts discourage applications for the sale of the jointly owned matrimonial home as in England, directing the parties to proceed under the Matrimonial Property Act 1978 for orders concerning the occupation or distribution of the matrimonial home? This course would be welcome.[553] Where a husband does seek a sale to defeat his wife's rights under the new legislation, there is no doubt that as the law stands now, the courts can refuse to acceed to the husband's application.[554] The same holds true when the wife applies.

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[551] Institute of Law Research and Reform, University of Alberta, Report No. 23, Partition and Sale, March 1977, at 11.

[552] It is worth noting that if a husband seeks partition, he must obtain approval from the relevant municipal district before a partition order will be granted; See Wensel v. Wensel [1977] 5 A.R. 379 (C.A.); See also The Planning Act, R.S.A. 1970, c. 276, s. 23(2). This section will also have implications for orders under Part I of the Matrimonial Property Act, 1978, c. 20.

[553] I have had correspondence shown to me by Professor Lown of the Faculty of Law at the University of Alberta where the lawyer for the other side had commenced an application for partition and sale simultaneously with an application under The Matrimonial Property Act, 1978. Professor Lown suggested that the Statement of Claim could be struck out as being frivolus and veatious. In any event, it would seem that under the old law, the courts have a discretion to refuse to make an order for partition and sale and that when the new Partition and Sale Act comes into force, the courts will have the power to stay partition or sale applications in certain circumstances.

(b) Saskatchewan

The case law in this area has been protective of the wife's rights under the Homesteads Act and when partition and sale has been sought, the law has favoured the wife and discriminated against the husband. It will be interesting to see how this area is resolved now that the new Matrimonial Property Act provides that spouses are equally entitled to occupy the matrimonial home.

In Perekopsky v. Perekopsky[555] the court dismissed the husband's application for partition and sale of the jointly owned matrimonial home on ground that under the Homesteads Act there was no right to order partition and sale. Tucker J. decided that the husband would only be entitled to partition if he obtained the consent of his wife.[556] The court entertained no doubt that a husband's application for partition, if granted, amounted to a disposition under the Homesteads Act and therefore the wife's consent was a prerequisite to a court order. In Petryshyn v. Petryshyn[557] however, the applicant was a wife and there were no obstacles in her way. McDonald J. said:[558]

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[554] It is interesting to note that the Partition and Sale Act (Bill 74 of 1978) does not state explicitly that a court has the discretion to refuse partition and/or sale. Also notable is section 9 which provides:
"Notwithstanding Section 2(2) (the court shall make orders for sale etc.) the Court may, with respect to land that comprises a matrimonial home as defined in the Matrimonial Property Act, stay proceedings under this Act
(a) pending the disposition of an application made under the Matrimonial Property, or
(b) while an order under the Matrimonial Property Act remains in force."
It would seem, therefore, that once a spouse obtains notice of partition and sale proceedings, that spouse would be advised to initiate proceedings under The Matrimonial Property Act for two reasons; (1) there may be no discretion under the Partition and Sale Act to refuse partition and/or sale, (2) if that is so, and if the spouse is possibly entitled to more than a half share, the Court has the power under the Matrimonial Property Act, but not under the Partition and Sale Act, to make an equitable distribution or even an out-and-out transfer of the matrimonial home to the spouse.

[555] (1973) 14 R.F.L. 282 (Sask. Q.B.).

> in my view (the Married Women's Property Act)[559] does not take away the right of a married person to commence an action for partition and/or sale of property in which they have an interest and I so hold.

The result was that a sale was ordered despite the fact that the wife had separate accommodation. These cases display the unsatisfactory state of the law. A wife can block her husband's application owing to the Homesteads Act but the husband is not protected because the Act applies only in favour of the wife. It is to be hoped that the courts will not allow this situation to continue once Saskatchewan's Matrimonial Property Act comes into force.

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[556] It is interesting to note that in Alberta and Manitoba, the Courts have not encountered the same problem.

[557] (1976) 29 R.F.L. 379.

[558] Id. at 381.

[559] R.S.S. 1965, c. 340.

(c) the other common law provinces of Canada

Under the relevant Partition Acts the courts have a discretion whether or not to make an order, however, in Manitoba, Ontario and British Columbia there is a prima facie right to partition. For an application to fail, it must be demonstrated that an order would cause substantial hardship[560] to the spouse seeking to remain in the home. The recent case of Humphrey v. Humphrey[561] indicates the approach which courts are taking. The wife in that case made an application under the Partition Act[562] and under section 12 of the Married Women's Property Act[563] for partition and sale of the jointly owned matrimonial home. McDermid Co. Ct. J. held that as the spouses "were joint tenants of the matrimonial home, their respective rights include rights to possession" and only in unusual circumstances "will a joint tenant not be permitted to exercise his or her possessory rights." The learned judge reviewed eleven cases, some cited by counsel, and concluded:[564]

> It is my opinion that if a spouse, who is also a joint tenant of a matrimonial home engages, without just cause, in a course

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[560] In B.C. the most recent test is one of "relative hardship." See Fernandes v. Fernandes [1976] 3 W.W.R. 510; see also McConnell v. McConnell and Royal Bank of Canada (1976) 30 R.F.L. 112 (economic oppression to turn wife out of the house; relative hardship test applied); McLennan v. McLennan (1976) 29 R.F.L. 117 (B.C.S.C.) (mental and emotional development of son would be seriously disrupted if partition and sale were ordered).

[561] (1977) 4 R.F.L. (2d) 189 (Ont. Co. Ct.).

[562] R.S.O. 1970, c. 338.

[563] R.S.O. 1970, c. 262.

[564] Supra n. 561 at 191.

> of conduct which results in the breakdown of the marriage relationship to the point that he or she has thereby effectively destroyed the matrimonial consortium, and further that such course of conduct results in some physical or mental harm or danger of a substantial nature to the other spouse or children of the marriage, then circumstances exist which permit me to exercise this discretion to grant exclusive interim possession of a matrimonial home to the spouse who has been subjected to such a course of conduct, notwithstanding that the offending spouse is a joint tenant and has possessory rights flowing from that proprietary interest.

The judge refused the wife's application ordering her to vacate the matrimonial home and the husband was granted exclusive possession temporarily. The case shows that courts will refuse applications for partition and sale and sometimes they will go even further making such orders as they think are just in the circumstances. The reasoning of this case will no doubt commend itself to those provinces where applciations for partition and sale continue to be popular. It will not be long, however, before these applications are superseded completely by the new provincial legislation.

(4) the power of the spouse to terminate the other spouse's occupation of the matrimonial home irrespective of ownership

(a) restraining orders ancillary to divorce proceedings or other matrimonial causes

(i) an introduction to weapons of domestic warfare

It is extraordinary that there should be so little reported case law in an area which is potentially so disruptive and where consequences are so serious. There is no doubt that these orders are obtained sometimes unnecessarily and so abused. In a conversation recently with one of Edmonton's sheriffs, I was told of an occasion when the sheriff, backed by police, went to the door of a matrimonial home to inform a husband that the court required him to vacate the premises as his wife had obtained successfully a restraining order. The sheriff was greeted at the door by the wife who informed the sheriff that her husband was in the garage. The wife in the presence of the sheriff asked the police if she was now rid of her husband once and for all. The sheriff went to the garage and found the husband to be quite a timid man and the implication from the conversation was that this had not been a proper case for obtaining a restraining order; indeed, the sheriff wondered if lawyers put words into their clients' mouths so that these injunctions would issue regardless of the merits of the case. There is no doubt that the issue of orders on the basis of ex parte applications is open to abuse. This was apparent in another conversation, this time with an Edmonton lawyer. I was told of a case where a wife obtained a restraining order with dire consequences. The wife was granted an injunction restraining her husband from entering the matrimonial home on an ex parte application while the husband was away on a short business trip. He arrived back with an armful of groceries to find the order of the court nailed to the front door of the house. He told his wife to let him in and was eventually hauled off by the police. There was no history of violence in the marriage and it did not seem to be a proper case for an injunction, and yet one was obtained. It was not surprising that the husband was very bitter and the outcome was astonishing. The parties had three homes but because of the wife's action the husband was determined that the wife would not get to remain in the matrimonial home; after all, it was his view that he had been excluded unfairly. Negotiations were protracted and no agreement could be reached. Partition and sale of the matrimonial home ensued eventually and their personal property inside the home was auctioned. The real beneficiaries of this situation were the lawyers. There are lessons to be learned from these instances. The nature of the problem lies in the fact that injunctions are obtained when they should not have been. In Alberta, for instance, there seems to be no consistency; sometimes the judges are happy to grant them, other times they are intransigent.[565]

(ii) jurisdiction

As in I.D.(4)(a) above, I am concerned primarily with the order excluding a spouse from the matrimonial home and I will assume that it is the husband being excluded for the purposes of discussion. There are various possibilities for the founding of jurisdiction. There exists the possibility of appealing to the courts inherent jurisdiction either to protect the children from terrible marital situations[566] or to allow a spouse to commence a petition for divorce without fear of being bullied out of her remedy.[567] The more usual jurisdictional route is via the Divorce Act.[568]

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565. It is difficult to obtain accurate statistics. Of the most recent unreported cases at the Law Courts in Edmonton, most inter partes have been successful and of the ex parte applications only those which are successful are recorded and this is because there is no prior documentation and so the number of unsuccessful ex parte applications are not known.

566. See Visscher v. Visscher (1972) 6 R.L.F. 392.

567. See Hastings v. Hastings (1971) 21 D.L.R. (3d) 244.

568. R.S.C. 1970, c. D-8.

The jurisdiction to grant injunctions under the Divorce Act stems from sections 10 and 12. Section 10(c) allows the court to make such interim orders as it thinks fit and just when a petition for divorce has been presented for relieving either spouse of any subsisting obligation to cohabit with the other.[569] Section 12 states that the court may attach terms, conditions and restrictions to section 10 orders. Where a spouse does not wish to petition for divorce but opts instead for a judicial separation under provincial legislation[570] then the various Judicature Acts of the common law provinces enable the court to grant restraining orders.[571]

(iii) jurisdictional problems

The jurisdictional question is not as clear as some presume. In Alberta in the case of Mathieson v. Mathieson[572] Allen J.A.

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[569] It might be argued that this section only provides for a non-cohabitation order, however s. 12 enables the Court to impose conditions which can include exclusion from the matrimonial home. It seems, however, that the distinction between the non-cohabitation order the the exclusion order is not as clear in Canada as it is in England, see supra n. 144 per Joseph Jackson Q.C.

[570] See e.g. The Domestic Relations Act, R.S.A. 1976, c. 113, Part 2.

[571] See e.g. The Judicature Act, R.S.A. 1970, c. 193, s. 34(9), "(9)...an injunction may be granted...by an interlocutory order of the Court or judge in all cases in which it appears to the Court or judge to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or judge thinks just." Donnelly, supra n. 377 at 69, suggests that s. 34(10) is also relevant. For the scope of the equivalent section in British Columbia, see Hille v. Hille, infra n. 593.

[572] (1974) 17 R.F.L. 355 at 357; and see in dicta of Sinclair, J.A. at 374. In 1970, D.P. McGuire made some cogent criticism of the ex parte injunction with the power of arrest provision; see "The Ex Parte Injunction in Matrimonial Causes," (1970) 8 Alta. L. Rev. 151.

questioned the validity of restraining orders:

> It will be noted that the order is rather drastic in its terms in that it grants the wife sole possession and occupation of the matrimonial home, directs the husband to forthwith vacate the premises, grants interim custody of the infant children of the marriage to the wife, and restrains the husband from visiting, molesting or interfering with the wife or the children and from entering upon the residential premises.
>
> Furthermore the order contains provision that any peace officer to whom a breach of the order is indicated is required to arrest the husband and bring him before a judge of the Court.
>
> I am somewhat at a loss to find authority for the granting of such an order, particularly the provision *requiring* a peace officer to arrest the appellant and bring him before the Court on it being "indicated" to such peace officer that the husband is in breach of the order. I understand that this clause or some somewhat similar is customarily included in orders of this type because, without it, the police will ordinarily refuse to take any action with respect to a breach or intended breach of the restraining provisions without formal proceedings having first been instituted, unless such a clause is included therein. However, as the question of jurisdiction or authority of the Judge to make such an order was not raised or argued before us, I will make no further comment on this point.

With respect, I am sure counsel could have mobilised arguments under the Divorce Act and Judicature Act and Rules of Court[573] to convince the court that it had jurisdiction.[574] It has been mooted, however, that when the husband owns the matrimonial home, the court does not have the power to exclude him. The case law suggests that this view is wrong. Even in the cautious decision of Duggan v. Duggan[575] there is a suggestion that the sole owner can be excluded. The case, however, is suspect in its reliance on Bendall v. McWhirter.

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[573] See Alberta Rules of Court, r. 354, r. 392 and r. 440.

[574] The jurisdiction for attaching a "power of arrest" will be examined below.

[575] [1965] 2 O.R. 651, (1965) 51 D.L.R. (2d) 576.

In Duggan the wife sought to restrain the husband from entering the matrimonial home or in any way molesting her or the children of the marriage pending trial of the action by the wife for alimony and other relief. In his short judgment, Ferguson J. reviewed several English authorities[576] and paraphrased Denning L.J. in Bendall v. McWhirter by saying that the wife had an irrevocable authority to stay in the matrimonial home and that as regards the husband, if he had in addition to desertion been guilty of cruelty or adultery, the wife was not bound to take the husband back. "She can keep him out of the house. Her possession may be quite exclusive."[577] Ferguson J. stated that there was a dearth of authorities in Ontario and contented himself with dicta from Donnelly v. Donnelly[578] and from Carnochan v. Carnochan.[579] In the later case, he found the dicta of Schroeder J. apposite:[580]

> the wife's right to continue to live in (the matrimonial home) would not give her the right to prevent her husband from sharing the accommodation which it affords.

From Donnelly, Ferguson J. gleaned the principle that a husband can enter his wife's house as of right only so long as he is not guilty of a matrimonial offence, but if he himself is owner of the matrimonial home the only recourse open to his ill-treated wife is to leave the house. Finally the English case of Silverstone v. Silverstone was used by the judge to reach his conclusion:[581]

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[576] Silverstone v. Silverstone [1953] P. 174; (Husband restrained from entering flat belonging to the husband); Bendall v. McWhirter [1952] 2 Q.B. 466; Shipman v. Shipman [1924] 2 Ch. 140; (Matrimonial home was wife's separate property); Northledge v. Northledge (1894) L.T. 815 (husband restrained from entering matrimonial home owned by wife owing to cruelty and adultery alleged in the wife's petition).

[577] [1965] 2 O.R. 651 at 657.

[578] Supra n. 371.

[579] [1953] O.R. 887.

[580] Id. at 895.

> that the husband who owns the matrimonial home can be restrained only if in addition to ill-treatment, he has deserted his wife and seeks to return.

This conclusion seems to owe more to Bendall v. McWhirter than it does to Silverstone. Cullity has criticised this principle as excessively rigid[582] and in 1978[583] he remarked that desertion has not been a prerequisite for the exercise of jurisdiction in England. It is not surprising that in 1965 legal rights should be causing problems in this area of the law; they were creating difficulty in England at the same time. In Duggan the wife was unsuccessful largely because the husband had a legal right to be in the matrimonial home although even in 1965 the court seems to recognise that a sole owner could be excluded in exceptional circumstances.

Ferguson J. might have mentioned the *parens patriae* jurisdiction as well as the Silverstone jurisdiction. The Silverstone jurisdiction was used again in Hastings v. Hastings.[584] The wife applied ex parte for an non-molestation order on the grounds that she could not serve her petition without one. She was frightened of being beaten up and no doubt thought that a non-molestation order would keep her husband's temper cool. MacPherson J. traced the authority for the granting of injunctions in a divorce action back to the Queen's Bench Act[585] prior to the 1968 Divorce Act. He then stated in the best tradition of Pearce J. in Silverstone (not cited) that:[586]

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[581] [1965] 2 O.R. 651 at 654.

[582] Supra n. 374 at 211.

[583] Supra n. 374, 1978 Supplement at 71, 72. Cullity refers to the judgment of Carmichael J. in Plowman v. Plowman (1970) 9 R.F.L. 160 at 172 as indicative of the right approach. The more recent cases cited in Section I.(D) above also state the principles more broadly.

[584] (1971) 21 D.L.R. (3d) 244 (Sask. Q.B.).

> an inherent power exists in the court to insure that a party may exercise the right to come to it for relief free from threats or pressures or intimidation by a respondent...who seeks to have the action abandoned.... The Court will interfere by injunction that a party is not prevented from obtaining justice: Montgomery v. Montgomery (1965) P. 46, per Ormrod J. at p. 51.

MacPherson J. made it plain that these injunctions should not become weapons of domestic warfare.

A further case from British Columbia shows the difficulties which can be encountered where the matrimonial home is owned not by the spouses but by a company. In Duleeuw v. Duleeuw[587] the trial judge had ordered that the wife was entitled to occupy the matrimonial home and this order was overturned on appeal. The Court of Appeal held that the trial judge lacked jurisdiction as the company had not been a party to the proceedings.

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[585] R.S.S. 1965, c. 72, s. 45(8); and see Todd v. Todd [1942] 2 W.W.R. 225, affd. [1942] 3 W.W.R. 653.

[586] Supra n. 584 at 244, 245.

[587] (1978) 5 B.C.L.R. 106.

(iv) grounds

Where a spouse can establish that potential or actual physical or mental harm will result from continued joint occupation of the matrimonial home, then there is good reason for obtaining an injunction. The same holds true where the children are being adversely affected by marital conflict. In Visscher v. Visscher[588] the needs of the children were foremost in the mind of Anderson J. The motion in that case had been brought by the wife to restrain the husband from entering the jointly owned matrimonial home. There was no suggestion of serious violence. Anderson J. said:[589]

> If it were not for the children, I would not consider granting an injunction to the petitioner. This is a drastic remedy[590] and is not available to one spouse merely because the presence of the other spouse causes unpleasantness, inconvenience and tension.[591] The fact is, however, that for the children of the marriage life has become intolerable and (without ascribing blame to anyone) it is not right or proper that they should be expected to live under extreme tension, merely because there is no likelihood of violence.
>
> The petitioner and respondent have shown that they are quite unable to conduct themselves in a normal and civilized manner and, therefore, the children must be protected from their outrageous and irrational behaviour.
>
> In the result there will be an injunction restraining the respondent from entering the marital home pending the trial of this action. The petitioner will have custody of the children with reasonable access to the respondent. The respondent should visit the home only for the purpose of picking up the children and for this purpose only.

This dicta is a distillation of much of the learning extant in England up until 1972. It will be interesting to see if the courts will drop eventually the "intolerable" tests as has been done in England.[592] The main point which emerges from the caselaw, however, is that the needs of the children are of great importance when deciding to grant injunctions.

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[588] (1972) 6 R.F.L. 392.

[589] Id. at 393.

[590] Echoing Willmer J. in Akingbehin v. Akingbehin, supra n. 119.

[591] Echoing the judgment in Hall v. Hall, supra n. 184.

The remaining reported caselaw, which is sparse, is not that illuminating and some of it is badly reported. For instance in Hille v. Hille[593] the petitioner at the divorce trial applied to have an injunction, which she had obtained earlier on an ex parte application, made permanent. It was held by MacDonnell L.J.S.C. that he had no jurisdiction to grant a permanent injunction under section 2(30) of the Laws Declaration Act.[594] The judge did state, however, that he had jurisdiction under M.R. 688[595] but with no reason given said that as the petition alleged adultery and not cruelty, an injunction could not be granted. This seems to be an instance where the court applied the rigid principle propounded in Duggan but it is impossible to tell from the report. Having stated that the judge had jurisdiction under M.R. 688 the report concludes that the court did not have jurisdiction, and that if it had, an injunction would not have issued owing to insufficient evidence. This far from lucid report ends with the citation of three English decisions which were supposedly followed[596] however none of them support the proposition that a petition must allege cruelty before an injunction would issue.

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[592] See Walker v. Walker, supra n. 186.

[593] [1976] W.W.D. 97 (B.C.S.C.).

[594] R.S.B.C. c. 213. This must surely be a reference to section 2(29) as section 2(30) concerns injunctions against railway companies. Section 2(29) is similar to section 34(10) of the Alberta Judicature Act.

[595] See B.C. Supreme Court Rules (Consolidated to June 26th, 1975) 104. M.R. 688 is also known as O. 50, r. 12.

[596] Hall v. Hall, supra n. 184, Phillips v. Phillips, supra n. 183, Robinson v. Robinson, supra n. 155.

In another British Columbia case, Hersog v. Hersog[597] the court applied the English decision of Bassett v. Bassett.[598] The husband sought to exclude his wife from the home. The marriage had been short and the matrimonial home had been conveyed by the husband into joint names at the request of the wife so as to make her feel secure in the community. Meredith J. proposed the following test:[599]

> To succeed in this application the petitioner must show first that the shared use of the property is a practical impossibility and, secondly, that he should be preferred as occupant since on balance he will suffer much greater hardship if denied the use of the premises.

On the evidence, Meredith J. found the situation to be impossible and decided that the hardship on the husband would be greater than that on the wife, as the house was an adjunct of his business. It is worth noting that the husband in that case offered to pay money towards the wife's alternative accommodation which must have made granting the injunction easier.[600]

The paucity of reported decisions does not make an evaluation of the law in this area a simple task, but there is no doubt that similarities exist between England and Canada in relation to restraining orders. For instance, in Duggan, there is evidence of a concern for legal rights and of a self-imposed problem with founding jurisdiction, such as the requirement of cruelty. Although it is desirable that restraining orders should not issue automatically, the court should not in stipulating formal requirements perpetuate intolerable domestic situations. However, in Visscher and in Hersog we see the courts adopting more modern tests and a recognition of the needs of the children. In any event, the injunction ancillary to matrimonial causes will no longer be so important now that the new provincial legislation in the sphere of matrimonial property is in force.

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[597] (1975) 22 R.F.L. 380.

[598] Supra n. 185.

[599] (1975) 22 R.F.L. 380 at 381.

[600] Cf. Hill v. Hill [1916] W.N. 59.

(iv) the power of arrest

The dicta in Mathieson v. Mathieson[601] questioning the validity of an order requiring a peace officer to arrest a spouse and bring him before the court on it being indicated to the police officer that the spouse had breached the order has been examined above. It seems that judges in Alberta could benefit from a reading of Ansah v. Ansah[602] where Ormrod L.J. stated that committal orders are remedies of the very last resort. As Ormrod pointed out, one wonders what the effect is on the children when they learn that their father is in jail owing to a court order obtained by their mother.

The strange thing about the power of arrest provision is that not so much as an affidavit need be filed that the spouse has been served with the original order and is now in breach. The judge has absolutely no control over the arrest. The same could be said of the Domestic Violence Act power of arrest[603] although indications are that it will be difficult to obtain. This is not the case, however, in Alberta where the approved form for a restraining order includes a power of arrest provision as a matter of course.[604] The following is an example of such a restraining order.[605]

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[601] Supra n. 572.

[602] Supra n. 285.

[603] See heading I.D.4(c)(vii) above.

IN THE COURT OF QUEEN'S BENCH OF ALBERTA[606]

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

PAULA FOLEY

Petitioner

-and-

ALAN FOLEY

Respondent

BEFORE THE HONOURABLE	At the Law Courts, Edmonton
MR. JUSTICE	Alberta, on Monday, the 4th day
IN CHAMBERS	of July, A.D. 1979.

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[604] See Notice to All Members, The Law Society of Alberta, dated December 5th, 1974. Form of Restraining Order (approved by Milvain, C.J. and the Judges of the S.C.T.D) Law Soc. File B-18, G139.

[605] See Alberta Bar Admission Course, 1978-1979, Vol. 3, Family Law Precedent 3 at 121, 122.

[606] Formerly the Supreme Court of Alberta, Trial Division; see The Court of Queen's Bench Act, S.A. 1978, c. 51, s. 2(1). The Act came into force on June 30th, 1979.

ORDER

UPON THE APPLICATION of the Petitioner, PAULA FOLEY: AND UPON HAVING HEARD read the Affidavit of the Petitioner, PAULA FOLEY, filed; AND UPON HAVING HEARD Counsel for the Petitioner;

1. IT IS HEREBY ORDERED AND ADJUDGED that the Respondent, ALAN FOLEY, be and is hereby specifically restrained from entering those premises municipally described as:

100 Chapman Crescent
in the City of Edmonton,
in the Province of Alberta.

2. IT IS FURTHER ORDERED AND ADJUDGED that the Respondent, ALAN FOLEY, is specifically restrained from interfering with or molesting the Petitioner and the children of the marriage either at the aforesaid residence or elsewhere in the City of Edmonton, in the Province of Alberta.

3. IT IS FURTHER ORDERED AND ADJUDGED that upon the Respondent, ALAN FOLEY, being in breach of any of the terms of the within Order, then in such event any Police Officer of the City of Edmonton Police Department shall forthwith arrest the Respondent, restrain him and bring him at the earliest possible date before a Judge of the Court of Queen's Bench of Alberta so that he may show cause why he should not be held on contempt.

4. IT IS FURTHER ORDERED AND ADJUDGED that the within Order shall cease to have effect three (3) months from the date of entry hereof or upon the trial of the within action, whichever shall first occur.

5. IT IS FINALLY ORDERED AND ADJUDGED that either party shall have leave to apply to amend, vary or strike out the within Order upon two (2) clear days notice.[607]

ENTERED THIS DAY
OF JULY, A.D. 1979

Clerk of the Court (seal)
of Queen's Bench

It would seem that the jurisdiction for clause 3 stems from section 12 of the Divorce Act enabling the court to impose conditions.[608] It is to be regretted that this power of arrest condition is imposed as a matter of course.[609]

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[607] This is not as beneficial as it appears. Should the husband apply to stike out the order, the wife need only ask for an Examination on the husband's affidavit and this will delay the hearing for six weeks or at least four weeks if private reporters are used.

[608] See also The Alberta Rules of Court, r. 354, and The Judicature Act, R.S.A. 1970, c. 193, s. 46.

[609] The remarks of McGuire, supra n. 572 are apposite: "It seems wrong in principle that an order expelling a man from his home, and threatening him with imprisonment if he tries to return, should not only be made behind his back, but should be made in such a form that the onus is cast on him to show cause against it, and that the order remains effective until such cause has been effectively shown."

(b) orders ancillary to the Married Women's Property Acts

Applications under these Acts for possession, or orders for sale or for injunction excluding a spouse from the matrimonial home were legion and they tended to meet with much more success in Canada than in England, which perhaps explains why there are so few reported cases on restraining orders ancillary to divorce.[610] The Acts have been referred to above[611] and the relevant sections of these Acts allow the court to make such order as it thinks fit which of course includes the granting of injunctions. The same fate, however, appears to be awaiting this procedure as the orders for partition and sale and injunction pending suit, owing to the advent of new provincial legislation. For instance, in Krentz v. Krentz[612] the wife applied under section 22(1) of The Married Women's Property Act[613] for an order granting her exclusive possession of the jointly owned matrimonial home. Batten D.C.J. reviewed all relevant authorities from Silverstone to Ainsworth and from Carnochan to Maskewycz. The judge concluded that the "realities of the matrimonial relationship" necessitated the overriding of legal rights and he gave exclusive possession to the wife. Subsequently section 22 of the Act was repealed and re-enacted in a different form.[614] The new section 22 included a transfer of property order[615] and gave the courts more power to override strict property rights than any equivalent legislative provision of its time in Canada. The case law on the ambit of the re-enacted section 22 has been extensive[616] but in 1979 the Saskatchewan Legislature enacted the Matrimonial Property Act[617] and section 60(1) repealed the re-enacted section 22 of the Married Women's Property Act. This piece of legislation will be considered in section D.(4)(c) below.

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[610] In fact, illustrative of the confusion in this area is Koechlin v. Koechlin (1974) 14 R.F.L. 25 where the lawyer for the wife applied for exclusive possession of the matrimonial home pursuant to Section 12 of the Married Women's Property Act and the local judge seemingly made the order ancillary to the divorce petition which was extant at the time. The husband was committed to jail subsequently and appealed successfully to the High Court who held that the local judge had no power to grant an exclusion order pursuant to s. 12.

[611] See page 123 above.

[612] (1975) 21 R.F.L. 86 (Sask. D.C.).

[613] R.S.S 1965, c. 340.

In Ontario the case law has been even more extensive[618] and uncertainties were just begging to be resolved when, with effect from

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[614] An Act to Amend the Married Women's Property Act, Stat. Sask. 1974-1975 c. 29; see also Rev. Stat. Sask. c. M-6 which has not yet been published.

[615] Section 22(2)(e).

[616] See e.g. Rusnak v. Rusnak [1976] 4 W.W.R. 515; Boardman v. Boardman (1978) 2 R.F.L. (2d) 156; Bowser v. Bowser (1975) 24 R.F.L. 394; Lauder v. Lauder [1978] 3 W.W.R. 205; Quibell v. Quibell [1977] 5 W.W.R. 755; Koshman v. Koshman (1976) 27 R.F.L. 249; Keller v. Keller (1975) 62 D.L.R. (3d) 758; Giesbrecht v. Giesbrecht [1976] 6 W.W.R. 212.

[617] Bill 68 of 1979, not yet in force.

[618] See e.g. Macina v. Macina [1953] O.W.N. 136 (H.C.); Re Lesser v. Lesser [1968] 1 O.R. 388 rev'd. [1968] 1 O.R. 693n (C.A.); Kearney v. Kearney [1970] 2 O.R. 152 (C.A.), section procedural and does not entitle the judge to disregard established principles of property law; Carnochan v. Carnochan supra n. 379; Audras v. Audras [1970] 2 O.R. 46, Re Maskewycz v. Maskewycz [1973] 2 O.R. (2d) 713, as a matter of practice applications for partition and sale of the matrimonial home should be made under both Acts rather than under section 12 alone; Re Yale and MacMaster (1974) 3 O.R. (2d) 547, section is procedural and does not give the Court broad powers over the legal rights of the parties; Re Sheppard v. Sheppard (1976) 10 O.R. (2d) 19 affd. 12 O.R. (2d) 4 (C.A.); Laprairie v. Laprairie, 1976 R.F.L. 207.

March 31, 1978, section 12 of the Married Women's Property Act was repealed by section 82 of the Family Law Reform Act.[619]

In Manitoba and British Columbia their Married Women's Property Act continue in force but like their partition and sale provisions, it will be superseded by the new legislation. Indeed in B.C. section 55 of the Family Law Relations Act[620] provides that orders under Part 3 are to prevail over the Married Women's Property Act in the event of a conflict.

Alberta's Married Women's Property Act[621] is innocuous in that it possesses no section 12 equivalent and so is not affected by the new legislation. The Atlantic provinces, except P.E.I., have their Acts intact,[622] but will be enacting new matrimonial property legislation soon. The idea behind these Acts was to allow the court to determine property rights in the matrimonial home and then to give effect to them provided the court thought it just to do so, and so the body of case law established under these statutes will probably not be of much assistance to the Courts when interpreting the new provincial legislation.[623] The advantage of the new legislation is that the court's hands are no longer tied by strict property rights.

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[619] S.O. 1978 c. 2; see also The Family Law Reform Act, S.P.E.I. 1978 c. 6, s. 68.

[620] S.B.C. 1978, c. 20.

[621] S.A. 1970, c. 227.

[622] See e.g. Tam v. Tam (1976) 24 N.S.R. (2d) 252 (wife applied unsuccessfully under the Married Women's Property Act for exclusive possession of the matrimonial home.)

[623] This is perhaps unfair to the case law. For instance, in Ragot v. Ragot (1976) 30 R.F.L. 183 Morse J. of the Manitoba Queen's Bench did not allow the wife's application for exclusive possession under the M.W.P.A. on the grounds that there was no urgent or serious risk of physical or mental harm or injury to the wife or daughter if the husband continued to occupy the matrimonial home. These considerations will apply under the new legislation but as we shall see in Section D.(4)(c) below, the legislation has often enumerated the factors which the court shall take into account when deciding to make an exclusive possession order.

(c) exclusion orders under the new legislation of the common law provinces

A study of partition and sale, restraining orders ancillary to matrimonial causes and applications for exclusive possession under the Married Women's Property Acts presents a cogent case for reform. This area, however, cannot claim credit for initiating the new legislation; that honour belongs rightly to the inability of the common law and equity to see through legal rights when coming to distribute resources on the breakdown of marriage. I propose to examine the provinces' legislation in turn. Within this legislation there is provision both for exclusion orders and distribution of property orders. We are concerned with the former in this section.

(i) British Columbia

The Family Law Relations Act 1978[624] was proclaimed in force effective March 31, 1979. Section 77 is the key provision for our purposes:

> 77(1) An order under this section is for *temporary relief* pending determination of the rights to the property of the spouses by agreement or by a court having jurisdiction in those matters.

The B.C. Legislature made it clear that orders under section 77 are not designed to solve the problem of the long term occupation of the matrimonial home. The property which can be the subject of a section 77 order is defined in subsection 2:

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[624] S.B.C. 1978, c. 20.

> 77(2) A court may make an order under this section respecting property that is owned or leased by one or both spouses and is or has been
> (a) occupied by the spouses as their family residence;...

Subsection 3 provides for the order itself:

> 77(3) On application, the court may order that
> (a) one spouse be given exclusive possession of all or part of the property,...
> for a period specified by the court in its order.

Section 77(4) avoids any doubt by stating that an exclusive possession order includes the right of occupancy but this is qualified by subsection 5, the effect of which is that when the rights of the excluded spouse as lessee or owner cease by operation of the law, for instance where he makes an assignment in bankruptcy, then the spouse with exclusive possession can no longer occupy the matrimonial home.

The B.C. legislation is not complicated and seems to cover many of the weaknesses inherent in the old law. Section 78 of the Act attempts to relegate the old law to a position of secondary importance, enabling the court to postpone the right of a spouse to apply for partition and sale during the currency of an exclusive possession order. Section 79 could have been placed within section 77(3) for its ramifications are similar. Section 79(2) however, seems to apply only to spouses who have separated, enabling the court to restrain a spouse from entering the other spouse's premises. Section 79(3) shows how far the law has come from the property right orientated common law. It provides as follows:

> 79(3) Subsection 2 applies notwithstanding that the spouse against whom the order is made owns or has a right to possession of the premises.

The one criticism I have of the B.C. Act is that it fails to stipulate guidelines for the granting of these temporary orders. Other provinces have not been remiss in this respect.

(ii) Alberta

The Matrimonial Property Act 1978[625] came into force on 1 January, 1979. In many respects it is similar to the B.C. legislation. Section 19 allows the courts to grant exclusive possession of the matrimonial home, however the court is not unfettered as in B.C. Section 20 enumerated four factors which the court must consider:

(a) the availability of other accommodation within the means of both spouses,

(b) the needs of any children residing in the matrimonial home,

(c) the financial position of each of the spouses, and

(d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.

The enumeration of these factors is welcome but they cannot be said to be comprehensive. The statute, however, is not totally free from criticism. By section 19(3) the court may make conditions which may mean that the Mathieson power of arrest problem will be perpetuated. It would have been beneficial if more thought had been given to this drastic remedy in view of the comments which were made in Mathieson by the Court of Appeal.

Section 21 could also give rise to difficulty. It provides that an exclusive possession order takes effect notwithstanding "...a subsequent order for the partition and sale of the matrimonial home." Just what is the situation if a spouse obtains a prior order for partition and sale or makes merely a prior application? It would seem that under the law as it stands now, the court has a discretion to refuse partition and sale.[626] But once the Partition and Sale Act is passed[627] it seems that the discretion is no longer preserved and that by clause 9 of Bill 74 the court may only stay proceedings under the Partition and Sale Act pending an application under the Matrimonial Property Act or while an order under the Matrimonial Property Act remains in force. This suggests that where a spouse initiates a partition and sale application, the other spouse has to initiate an application under the Matrimonial Property Act if he or she wishes to avoid partition and sale. This is regrettable in that under the old law the spouse opposing a sale did not have to go to the expense of initiating further proceedings but could have asked the court in the partition and sale proceedings to settle the occupation of the home there and then by invoking the court's discretion not to order a sale.

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[625] S.A. 1978, c. 20.

With new legislation it is interesting to see how it will be interpreted by the courts. On January 17, 1979 McLean J. heard an inter partes application under Part 2 of the new Act, certainly one of the first applications to be made,[628] as the Act had only been in force for 17 days. The case is unreported.[629] The parties were married in 1961 and there were 4 children of the family. The husband had left the matrimonial home in November but had come home for Christmas and decided after the holiday not to leave. The wife could not abide the situation so she left and subsequently sought an exclusive possession order under

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[626] See e.g. Re Kornacki v. Kornacki, supra n. 550.

[627] Bill 74 of 1978; so far the Bill has not been reintroduced into the legislature.

[628] The application was made by L. Pollock, Esq.

[629] No. 28647 Newman v. Newman, January 17, 1979.

Part 2. Counsel for the wife argued that Part 2 was simply a codification of the law on restraining orders. He pointed out that the wife was unstable and unsure of her emotions, that the husband was not looking after the children properly and that the situation in the household was intolerable. Counsel told the court that the husband had alternative accommodation to go to and suggested that tranquility would be served if the status quo as of November 1978 were returned to and the husband asked to leave the matrimonial home. McLean J. ordered inter alia:

> (1) that the husband should move out of the matrimonial home and that exclusive possession be given to the wife for three weeks;
>
> (2) that the wife and husband should present themselves for an examination on their affidavits within three weeks so that the question of occupation could be resolved.

The case is interesting in that Counsel for the wife suggested that this Part 2 order was a codification of the law relating to restraining orders and it does seem that judges are treating the Part 2 applications in that light. Indeed in conversation with lawyers who had taken Part 2 applications the indication is that the new Act is being administered carefully. This means that Part 2 will not be used to settle the long term occupation of the matrimonial home; the parties must resort to distribution of property orders under Part 1 for that question.

It remains to be seen whether the power of arrest will be attached to Part 2 orders and whether Part 2 orders in general will issue as easily as restraining orders under the Divorce Act. In this respect section 30(2) is apposite. It provides that an order may be made ex parte if the court is satisfied that there is danger of injury to the applicant spouse or a child residing in the matrimonial home. This should preclude the use of the Part 2 order as a tactical weapon by wives who wish to get their husbands out of the home without an inter partes hearing when there is no history of violence nor risk of danger.

(iii) Saskatchewan

The Matrimonial Property Act[630] is not yet in force but it is perhaps the best drawn piece of legislation in this area. It has no doubt had the benefit of hindsight in that it is the youngest piece of legislation in this field. The matrimonial home is comprehensively defined in section 2(g) in contrast to a more limited definition in the B.C.[631] and Alberta Acts.[632] Part 1 of the Saskatchewan legislation follows the Ontario format[633] in that section 4 gives both spouses, as between themselves, an equal right of possession of the matrimonial home subject to:

(a) s. 43; the Act does not vest title or any interest in the matrimonial home owned by one spouse in the other,

(b) an exclusive possession order under the Act,

(c) any other order under the Act,

(d) any order pertaining to the occupation of the matrimonial home prior to the Act,

(e) any interspousal contract.

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[630] Bill 68 of 1979.

[631] The Family Relations Act, S.B.C. 1978, c. 20, s. 77(2).

[632] The Matrimonial Property Act, S.A. 1978, c. 20, s. 1(c). See also Manitoba's Family Maintenance Act S.M. 1978, c. 25/F.20 in which no definition is given. For the Ontario legislation, see The Family Law Reform Act, S.O. 1978, c. 2, s. 39.

[633] See The Family Law Reform Act, S.O. 1978, c. 2; s. 43.

Section 5 operates in the same manner as Alberta's section 19 and B.C.'s section 77 except that it is more detailed. For instance, any possible doubt as to the ambit of an exclusive possession order is removed by section 5(2) which provides that exclusive possession includes the right of occupancy. Section 5 is well thought out in that instead of allowing exclusive possession orders to be made subject to such conditions as the court may care to impose, the section actually directs the court's attention to conditions which may be made without in any way limiting the court's powers. An example is section 5(b):

> (b) (the court may) direct that a spouse be given exclusive possession of a matrimonial home or part thereof for life or for any shorter period that the court directs, and that order shall be subject to any terms and conditions that the court thinks fit and shall be effective for any period of time the court directs, regardless of whether the spouses cease to be spouses, and may be a temporary or interim order only;....

This section is well conceived. It allows the court to settle the occupation of the matrimonial home once and for all, saving the parties the expense of having to seek a distribution of property order as is the case in B.C., where an order under section 77 is stated to be for "temporary relief." A novel feature about this paragraph is that the order can continue whether or not the parties cease to be man and wife. A defect in the old law was that the personal right of a spouse to remain in the home automatically ceased when the marriage terminated and this paragraph would seem to allow courts to cure that defect.

Another useful condition is contained in paragraph (g) of section 5, enabling the court to fix the obligation to repair and maintain the matrimonial home. Such a condition could prove useful to a wife who is in occupation of the home with children to look after and without the extra resources to maintain the matrimonial home.

Section 7 provides that the court shall have regard to seven factors when making an order under Part 1. These are:

(a) the needs of the children,
(b) the conduct of the spouses,
(c) availability of alternative accommodation,
(d) the spouses' financial position,
(e) interspousal contracts or other written agreements,
(f) court orders prior to the Act,
(g) any other relevant fact or circumstance.

These factors are similar to those contained in the Alberta legislation save for the addition of (b), the conduct of the spouses. In England the courts have attempted to discourage the filing of affidavits concerning conduct when considering applications for transfer of property orders, but where the court is considering awarding exclusive possession of the matrimoninal home to one spouse, the conduct of the other one will be material. For instance, if the parties are living together at the time of application and if there has been no history of violence, then the court may decide that an exclusive possession order is not warranted.

As in Alberta, ex parte applications can be made if the situation is urgent. A slightly different approach, however, is contained in section 18 which provides for stiff monetary penalities for non-compliance with orders under the Act and these penalties are additional to other sanctions, such as committal for contempt. Section 18 is similar to section 3 of the Alberta Dower Act[634] and is not found in any other equivalent provincial legislation on matrimonial property.

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[634] R.S.A. 1970, c. 114.

The only disappointing feature of the Saskatchewan legislation is that it did not attempt to resolve a possible conflict between orders under the 1979 Act and partition and sale applications and orders. Other than that, the Saskatchewan legislation is well drawn and it is to be hoped that the Atlantic provinces, save for P.E.I., will benefit from it when they come to introduce new legislation on matrimonial property.

(iv) Manitoba

The chequered history of Manitoba's new legislation has been documented above. For our purposes the relevant statute is the Family Maintenance Act[635] which was proclaimed in force effective October 15, 1978. Section 8 is the main provision allowing the court to make an order that the spouse be no longer bound to cohabit with each other[636] or that a spouse shall not enter upon any premises when the other spouse is living separate and apart.[637] On the face of section 8(b) and (c) it would seem that where the spouses are actually living together under the same roof the courts are powerless to grant exclusive possession orders to a spouse in need, as a non-cohabitation clause does not give a spouse the right to force the other spouse out of the matrimonial home. However, section 8 states that the court:

> may make any provision in the order subject to such terms and conditions as the court deems proper.

This will allow the court, therefore, to order a spouse to vacate the matrimonial home when making a section 8(b) order.

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[635] S.M. 1978, c. 25/F.20.

[636] Section 8(b).

[637] Section 8(c).

To counter arguments that the court does not have the power under the Act to turn a spouse qua owner out of his or her home, section 10 provides that where an order is made under section 8(1)(b), the court may include in the order that a spouse has the right to occupy the matrimonial home notwithstanding that the other spouse alone is the owner of or lessee or that the spouses are joint owners of the premises.

When making a section 8 order the court is obliged to consider by virtue of section 4 all relevant circumstances and the list is similar to that contained in section 25 of the English Matrimonial Causes Act 1973. There are other useful sections such as section 19 enabling the court to make ex parte orders if the court is satisfied that it is necessary. Also relevant is section 10(2) which allows the court to prevent a spouse applying for partition and sale after an exclusive possession order has been obtained. Overall the Act contains the vital ingredients but it is not as coherent piece of legislation as the Saskatchewan model which may have something to do with the fact that the Manitoba Act was introduced in 1977 and had to survive a change in government.

(v) Ontario and Prince Edward Island[638]

The Ontario Family Law Reform Act[639] is the pioneer in this area in that it was the first legislation of its kind to come into force, the date being March 31, 1978. It was followed by Manitoba's legislation on October 15, 1978 and then by P.E.I. on December 31, 1978. Alberta's legislation came into force on January 1, 1979 and British Columbia's on March 31, 1979. Saskatchewan's Act is not yet in force.

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[638] Part II of Prince Edward Island's Family Law Reform Act, S.P.E.I., 1978, c. 6 is almost identical to Ontario's Act save that Ontario imposes restrictions on its provincial court [s. 45(3)] and the P.E.I. legislation does not; P.E.I. also omits Ontario's s. 43(4) from its Act and P.E.I.'s s. 49(2) (Part III is not retroactive) is opposite to the equivalent Ontario provision.

[639] S.O. 1978, c. 2.

The key section of The Family Law Reform Act is section 45:

> Sec. 45. Order for possession of matrimonial home. -- (1) Notwithstanding the ownership of a matrimonial home and its contents, and notwithstanding section 40, the court on application[640] may by order,
>
> (a) direct that one spouse be given exclusive possession of a matrimonial home or part thereof for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Part;
>
> (b) direct a spouse to whom exclusive possession of a matrimonial home is given to pay such periodic payments to the other spouse as is prescribed in the order;
>
> (c) direct that the contents of a matrimonial home, or any part thereof, remain in the home for the use of the person given possession;
>
> (d) fix the obligation to repair and maintain the matrimonial home or to pay other liabilities arising in respect thereof;
>
> (e) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home subject to the right to exclusive possession of the other spouse as ordered; and
>
> (f) where a false affidavit is given under subsection 3 of section 42, direct,
>
> (i) the person who swore the false affidavit, or
>
> (ii) any person who knew at the time it was sworn that the affidavit was false and who thereafter conveyed the property

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640. For an example of the form in which an application under Part III can take, see Family Law, Checklists and Precedents (1978-1979) Department of Continuing Education, Law Society of Upper Canada (March 1979) at 58, 178-182.

> to substitute other real property for the matrimonial home or direct such person to set aside money or security to stand in place thereof subject to such terms and conditions as the court considers appropriate.
>
> (2) *Temporary possession.* An order may be made under subsection 1 for temporary relief or pending the bringing or disposition of another application under this Act.[641]
>
> (3) *Order where no property interest.* An order under subsection 1 for exclusive possession may be made only if, in the opinion of the court, other provision for shelter is not adequate in the circumstances or is in the best interests of a child to do so.

It is easy to see that the other provincial legislation borrowed from this section and some provinces improved upon it. The strong points of the Act are evident. For instance, section 49(2)(c) provides that this Part takes priority over applications or orders made before the Part came into force. This will allow a spouse to obtain the benefit of section 45 when legal rights vested in the other spouse may have denied the applicant spouse justice earlier. The Act, however, does have some weaknesses, in that no guidelines are laid down[642] for the court to consider when making a Part III order; instead the court must develop the principles to be applied for itself.

Section 48 of the Act provides for the registration of exclusive possession orders and all of the new provincial Acts which we have examined above have equivalent provisions. The benefits of registration are obvious in that a spouse in possession but without title to the matrimonial home can protect her possession by giving third parties notice of her rights conferred by court order.

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[641] E.g. a distribution of property order under Part I.

[642] Except in section 45(3) (alternative accommodation and best interests of the children). In Cipens v. Cipens (1978) 21 O.R. (2d) 134 at 139 Steinberg U.F.C.J. suggested that the criteria set out s. 18(5) re maintenance should apply to s. 45 orders, as section 45 orders also relate to maintenance.

The Ontario statute has been in force for just over a year and a body of caselaw is beginning to form.[643] One of the first cases decided under the Act has an interesting history. In Campbell v. Campbell[644] the provincial court judge dismissed the wife's application for exclusive possession of the matrimonial home on the grounds that urgency had not been demonstrated and that ex parte orders should only be made in exceptional circumstances. A similar discouragement of ex parte applications prevails in England as we have seen above. Next it was the husband's turn and he applied to the Ontario Supreme Court[645] for interim exclusive possession of the matrimonial home. Master McBride granted the husband's application. The fascinating aspect of this case is the evidence that came out before the Master and which was suppressed before the provincial court. It appears from the evidence that the wife suffered from severe obsessive compulsive psychoneurosis and was a menace to the children. In the result the husband was given custody of the children and interim exclusive possession of the home, mainly because it was clearly in the best interests of the children.

The learned Master pointed out that in two recent decisions of his,[646] he had had the opportunity to make orders under the Act but held that in the absence of cruelty, there was no compelling reason to issue an exclusive possession order. He also stated that the fact that one spouse has custody was not a sufficient reason in itself to warrant an order for exclusive possession. These remarks by the Master were obiter and they show how the courts are forced to evolve principles for the granting of exclusive possession orders owing to the fact that the Act is silent on guidelines for such orders.

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[643] See e.g. [1978] C.C.L. and [1979] C.C.L.; see also The Family Law Reform Reporter, F.L.R. Publications Inc., Ontario (1978-and continuing), referred to as the F.L.R.R., and Family Law, Vol. 1, CCH Canadian, New Matters.

[644] May 18, 1978, (1978) 2 R.F.L. (2d) 249.

[645] July 4, 1978, (1978) 6 R.F.L. (2d) 392.

[646] As yet unreported.

In another case,[647] decided one month after the Act's commencement, Naismith J. reviewed Canadian and Australian authorities and laid down the following considerations to be taken into account when deciding to grant an exclusive possession order:

(1) suitability of the home and the interests of the children;

(2) whether the respondent's conduct amounts to cruelty, therefore justifying exclusion from the matrimonial home,

(3) whether the continued shared use of the home will result in violence,

(4) duress experienced by the applicant,

(5) the prospects of alternative accommodation for the respondent in view of his financial position,

(6) the availability of further review of the order.

Following this decision of Naismith J. are three cases decided in June, 1978. In Busse v. Busse[648] the applicant wife applied ex parte for an interim order restraining the husband from molesting her pursuant to section 34 and for exclusive possession of the matrimonial home pursuant

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647. May 31, 1978, Miller v. Miller (1978) 2 R.F.L. (2d) 129, (1978) F.L.R.R. at 10; Prov. Ct. (Fam. Div.).

648. July 14, 1978, (1978) 2 R.F.L. (2d) 273, [1978] C.C.L. 7641, F.L.R.R. at 13, [1978] 2 A.C.W.S. 529, University of Alberta Computer Services, Faculty of Law, 780614.

to section 45(2). The provincial court judge granted the application and held that where service of proceedings on a husband by a wife would jeopardise the wife's safety, the court may grant relief ex parte without corroboration of the wife's evidence. This practice endorsed by the provincial court judge is clearly a useful one but it is open to abuse. The court should therefore ascertain that an *ex parte* is necessary, otherwise the Part III orders will be used as tactical weapons. In Busse the husband's ability to find alternative accommodation plus the fact that the wife had been subjected to violence and that she owned the home was considered persuasive by the judge.

In Cicero v. Cicero[649] the Unified Family Court granted the wife an exclusive possession order largely because it was in the interests of the children to do so. The court also took into account that there was no suggestion of alternative accommodation being found and that a sale would not help the husband as the property was not worth very much money. In Thurston v. Thurston[650] Peel Co. Ct. J. directed his mind to section 45(3) when deciding to make an exclusive possession order in favour of the wife who did not have custody of the children. The judge held that it was not in the best interests of the children to make an order for exclusive possession in favour of the parent who does not have custody of those children.

In August 1978 came the decision in Langtvet v. Langtvet.[651] Killeen Local Judge S.C.O. ordered that it was in the best interest of the children for the mother to have exclusive possession of the matrimonial home until the youngest child of the family reached the age of 18. This order has the same form as the Mesher order discussed above. Other than the judge's commendable concern with the interest of the children, there is also dicta indicative of the approach being taken to the Family Law Reform Act:[652]

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[649] June 15, 1978, F.L.R.R. at 34.

[650] June 16, 1978, F.L.R.R. at 17.

[651] August 14, 1978, (1978) 7 R.F.L. (2d) 224, F.L.R.R. at 15.

> it would be imprudent to cast a strait-jacket from the past around the muscles and sinews of the new statutory creature. If anything, these provisions require me to assess the competing claims against the total backdrop of the marriage, with interpersonal, social, economic and related factors being given their full and fair play.

It is interesting to note that in Campbell v. Campbell[653] Master McBride perhaps unintentionally restricted the scope of the new Act by suggesting the requirement of cruelty as a prerequisite for an exclusive possession order. The importance of the needs of the children show that it is dangerous to confine the ambit of section 45 or to require certain elements. Indeed in Cicero there was dicta suggesting that "*prima facie*" the husband is entitled to realise his joint interest in the matrimonial home. The judge decided to import a notion from the past, viz. a *prime facie* entitlement to realisation of a joint interest, and so steps into the trap which Killeen J. sought to avoid.

In Sager v. Sager,[654] however, the husband in that case succeeded in obtaining a sale. The wife applied for exclusive possession for a period of 10 years and the wife and two children were in possession of the home at the time of the application. Osler J. ordered a sale and no doubt thought that the wife's share of between $17,595 and $19,950 would enable her to find alternative accommodation. In the C.C.H. report of the case Osler J. pointed out:[655]

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[652] (1978) 7 R.F.L. (2d) at 224.

[653] Supra n. 645.

[654] August 30, 1978, Family Law, Vol. 1, CCH Canadian, New Matters, para. 25.197; F.L.R.R. at 40.

> It was true that the wife would be unable to obtain a residence comparable to the matrimonial home: the almost inevitable result when families were divided was that neither unit could continue to live at the level to which they had been accustomed.

The judge catered to the temporary interest of the children by postponing the sale to the end of the school year. As the husband was earning over $20,000 a year this might have been a suitable case for a Mesher order but the judge must have decided that the disruption of a sale to the children in a year's time would not be that great. In his decision he did state that the wife would be able to purchase a town house without having to move too far from their present neighbourhood.

In one of the more recent decisions, Cipens v. Cipens,[656] which has been referred to above, the court held that where neither party could afford to live separate and apart and where the wife's desire to remain in the matrimonial home was based on emotional rather than economic reasons, then partition and sale would issue for the strong economic reasons outlined.

There will be further cases,[657] and the law is being worked out on a case by case basis; the lack of clear guidelines in The Family Law Reform Act precipitated this course.

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[655] Id. at para. 25.197.

[656] September 26, 1978, supra n. 540.

[657] See e.g. Re Cotroneo (1978) 2 O.R. (2d) 252 (Co. Ct.); property not a matrimonial home.

(d) transfer of property orders under the new legislation

This is the ultimate sanction when it comes to terminating a spouse's occupation of the matrimonial home. It was possible to obtain a transfer before the new legislation, though not under the Divorce Act.[658] One method was to apply for partition and sale of the matrimonial home and to ask the court to order a transfer of the husband's share to the wife, for instance where the husband's share amounted to a sum equivalent to a lump sum award for alimony and which was still owing to the wife at the time of application.[659] This route is now supplanted by the new legislation which clearly envisages circumstances when the matrimonial home can be transferred from one spouse to the other no matter who owns the property. It has been done already in Ontario in the case of Weir v. Weir[660] where Southey J. said that an equitable division of the family assets would be achieved by permitting the wife to have sole ownership of the matrimonial home subject to the existing mortgage on it. This type of order is equally possible under the other

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658. K. v. K. (1975) 20 R.F.L. 22. But see Reichert v. Reichert (1979) 16 A.R. 50 (Sept. 21, 1978) where MacDonald J. directed that the Registrar of the Land Titles Office cancel the existing Certificate of Title in the husband's name and vest the title in the name of the wife as sole owner in fee simple in settlement of the wife's claim for a lump sum settlement.

659. Wagner v. Wagner (1970) 73 W.W.R. 474; Smith v. Smith (1976) 29 R.F.L. 91 (Alta S.C.T.D.).

660. [1979] C.C.L. 3184, (1978) R.F.L. (2d) at 195.

provincial legislation[661] and it is this writer's hope that the courts administering the new law will benefit from some of the English decisions in this area discussed at heading D.(4)(d) above, such as Hanlon v. Hanlon.[662] Many Canadian courts now have the ability to crystallise the parties' interests in the matrimonial home and family assets once and for all with the least disruption. Unfortunately there has been an early indication that the courts may not make the most of the new legislation and it is to be hoped that the courts will eschew the opinion of Galligan J. in Silverstein v. Silverstein[663] wherein he states:[664]

> It was suggested that exclusive title to the matrimonial home be vested in the wife's name, the remaining assets to be awarded to the husband. While such a suggestion had a certain attraction to my sense of fairness and has a certain practical attractiveness I do not think that The Family Law Reform Act permits me to arrive at such a result. Had I acceded to that request, in my opinion I could only have given effect to it if I had interpreted the Family Law Reform Act as giving a court a broad, sweeping, general power to arrange property among separating spouses in accordance with what seems fair and just to a court in a particular set of circumstances. I think that the legislature did not intend to give any such power to the court.

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[661] B.C. - Family Relations Act, S.B.C. 1978, c. 20, sections 43, 45, 51 and 52; especially 52(2)(b); Alta. - The Matrimonial Property Act, S.A. 1978, c. 22 sections 1(c), 7, 8, 9, especially 9(2)(n); Sask. - Matrimonial Property Act, Bill 68 of 1979, clauses 20, 21, 22, especially 22(1)(d) and 26(1)(b)(vii); Man. - The Marital Property Act, S.M. 1978, c. 24/M45, sections 1(d)(i) and 1(e), 12, 13, especially 3(1); Ont. - Family Law Reform Act, S.O. 1978, c. 2, sections 3(b), 4, 6, especially 6(a); P.E.I. - Family Law Reform Act, S.P.E.I. 1978, c. 6, sections 4(a), 5, 7, especially 7(a).

[662] Supra n. 308.

[663] (1978) 1 R.F.L. (2d) 239 [Ont. S.C. (Family Law Division)].

[664] Id. at 261.

If judges do pay attention to fairness and if they seek to minimise disruption to the family on the break up of a marriage, then they will do what seems fair and just and will not gather Galligan J.'s mantle of impotence around them. Happily in the later case of Weir v. Weir[665] Southey J. was able to provide for the wife's happiness in that case by allowing her to remain in the matrimonial home, giving her sole ownership of it but compensating the husband by making no order as to the non-family assets, the reasoning being that the wife's interest in the latter assets was equivalent to her husband's half interest in the matrimonial home. This order is an example of the type that should and can be made under the Act and it achieves a practical justice.

(5) the power of the spouse to terminate the other spouse's occupation of the matrimonial home where the matrimonial home is a tenancy

This area is not beset with a history of lengthy and complicated statutory regulation as is the case in England. For that reason alone spouses' rights are not as secure against scheming partners or landlords. Generally, restraining orders are obtainable ancillary to divorce where the accommodation is rented and under the new legislation exclusive possession orders can also be sought. The new Acts, however, recognise the precarious position of the spouses when they seek orders giving them the exclusive right to occupy rented premises. For instance, in Manitoba, section 10(3) of the Family Maintenance Act provides:

> (3) *No right of occupancy of a spouse ordered under this section shall continue after the rights of the other spouse as* owner or *lessee* or of both spouses as owners or lessee, as the case may be, *are terminated.*

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[665] Supra n. 660.

British Columbia[666] and Saskatchewan.[667] have similar provisions. Alberta's Act[668] is slightly novel in this respect. Section 24 provides:

> If a matrimonial home is leased by one or both spouses under an oral or written lease and the court makes an order giving possession of the matrimonial home to one spouse, that spouse shall be deemed to be the tenant for the purposes of the lease.

This will allow the spouse to pay rent as if he or she were the tenant under the lease. The section does not provide for a transfer of the tenancy from the dispossessed spouse to the spouse with exclusive possession and so where there are covenants against assignment the Alberta courts will not run into the same problems which have been encountered with the transfer of Council tenancies in England.[669]

There may be problems, however, in Saskatchewan. The matrimonial home's definition includes property that is leased[670] and section 22(1)(d) allows the court to vest the matrimonial home in one spouse. If the courts allow tenancies to be transferred under this section they will have to be aware of the existence of covenants against assignment which may unwittingly be breached by such an order. The same problems could arise in the other provinces when the transfer of a tenancy is sought.

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[666] The Family Relations Act, S.B.C. 1978, c. 20, s. 77(5).

[667] The Matrimonial Property Act, Bill 68 of 1979, section 13.

[668] The Matrimonial Property Act, S.A. 1978, c. 20.

[669] See heading I.D.(5)(e)(ii) above.

[670] Supra n. 667, s. 2(g)(i)(A).

E. The ideal way to determine disputes today as to the occupation of the matrimonial home

In the state of the law in Canada's common law provinces, it is not an easy task to claim how disputes can be solved ideally today but a parallel between England and Canada does exist. If a spouse wishes to save the marriage or to have a "cooling off" period before making a final decision on the future of the marriage, that spouse can obtain an exclusive possession order either ex parte or inter partes but without having to petition first for divorce. That spouse could also obtain a judicial separation and seek an injunction excluding the other spouse from the matrimonial home at the same time, without ending the marriage completely.

When there is nothing left in the marriage to save, a spouse would be advised not to apply for a restraining order ancillary to divorce or for partition and sale or an order under the surviving Married Women's Property Acts. The new provincial legislation will provide the most satisfactory means for settling the occupation of the matrimonial home and where the spouse is in the home with children to care for, counsel will no doubt attempt to insure that the spouse is able to remain in the home, whether it takes the form of a temporary exclusive possession order or a once and for all distribution of property order.

Conclusion

In this thesis I have attempted to explore the nature of the right of husband and wife to occupy the matrimonial home. The exploration has illustrated that the word *right* has been misused occasionally and that as a result the law in the area has been misunderstood. The common law, for instance, has been used as a source for establishing an *irrevocable right* to occupy the matrimonial home but on a close analysis the *right* appears revocable and limited to the point where the use of the word is not meaningful. Another misunderstood but much resorted to area is that of the restraining order. Both in Canada and in England are they sought with regularity but without perhaps much thought given to whether or not they are a proper remedy in the circumstances.

The thesis has attempted to demonstrate that the area has many interrelated facets. Whenever one spouse seeks to establish an exclusive right to occupy the matrimonial home, not only husband and wife are affected, but third parties' interests are invariably involved. It is perhaps this additional complexity which makes the framing of the new legislation so important and vulnerable to criticism.

The relation of husband to wife itself gives rise to difficulty. The bitterness and stubbornness that can occur upon the breakdown of marriage is capable of creating problems in relation to the occupation of the matrimonial home and they can manifest themselves in the abuse of the legal process. This has been documented in relation to the obtaining of restraining orders as well as in relation to the institution of different applications all directed towards occupying the matrimonial home or realizing it so that one spouse does not have the advantage of occupation.

The law governing the occupation of the matrimonial home has progressed considerably and England and Canada provide a contrast having proceeded in the same direction though on different lines. Legislation in England has stated explicitly that spouses have registrable rights of occupation where the legal right to occupy is absent. In Canada there has not been as forthright a legislative statement in any of the provinces. The trend seems to be the establishment of an equal right to possession which is unregistrable. Where does this leave us? In England the law has enshrined rights of occupation of the matrimonial home no matter where legal title lies. Canada has followed suit but not as effectively. The registration provisions, such as they are, function well in relation to third parties, but as between husband and wife there are deficiencies. It is unfortunate that more thought was not given to establishing a clear and well thought out right to occupy the matrimonial home, informing spouses that only a court order or consent of the parties could change that right. At the moment the weaker spouse in terms of strength and title is still protected inadequately.

Once the spouses resort to litigation, England and Canada have witnessed a significant progression from the old common law. Now a veritable battery of remedies is available to spouses who wish to occupy the matrimonial home exclusively. No longer are spouses forced to seek restraining orders ancillary to divorce with their attendant jurisdictional traps and technicalities. Gone, too, are simultaneous applications under the Married Women's Property Acts and Partition and Sale Acts. The new provincial legislation has made the procedure simpler and the guidelines clearer. As a result the courts should be able to look upon the question of the occupation of the matrimonial home as a housing matter where the needs of the family and spouses will be given the most weight and where presumptions and legal title will no longer be decisive.

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